

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF MASSACHUSETTS

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5                 SHAWN DRUMGOLD,                           ) C.A. No. 04-11193-NG  
6                 PLAINTIFF                                  ) Courtroom No. 2

7                 VS.

8                 TIMOTHY CALLAHAN, ET AL., ) 1 Courthouse Way  
9                 DEFENDANTS                                  ) Boston, MA 02210

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11                 JURY TRIAL DAY 1 OF PHASE II

12                 OCTOBER 19, 2009

13                 9:15 a.m.

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18                 BEFORE THE HONORABLE NANCY GERTNER  
19                 UNITED STATES DISTRICT COURT JUDGE

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VALERIE A. O'HARA

OFFICIAL COURT REPORTER

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## PROCEEDINGS

( THE FOLLOWING IN JUDGE'S CHAMBERS: )

3 THE COURT: You've gotten the jury instructions?  
4 I don't know why you didn't.

5 MR. ROACHE: I was not.

6 THE COURT: Did we give you a copy?

7 MR. ROACHE: Yes.

8                   THE COURT: What I'll do, we'll mark the universe  
9 of articles, the article from The Herald on.

10 MS. HARRIS: Yes.

11 THE COURT: Yesterday and the article from the  
12 Globe was also yesterday?

13 MS. HARRIS: Yes.

14 ( Two newspaper articles were marked Exhibit A  
15 for identification.)

16 THE COURT: Is there another article that I should  
17 ask them about?

18 MS. HARRIS: I am not aware of anything today.

19 MR. CURRAN: Just there was an article last week  
20 about the jury verdict.

21                   THE COURT: That's included. I'm sorry, there's a  
22                   Globe 10-15 and a Herald article 10-18, and that's the  
23                   universe, so we'll ask them about that. I think you saw in  
24                   my rulings that I'm not going to, unless something comes out  
25                   of this questioning, I'm not going to disqualify the

1 foreman, the foreperson of the jury.

2 MR. CURRAN: Judge, before you make that  
3 decision --

4 THE COURT: I made that.

5 MR. CURRAN: -- I ask that you inquire a little  
6 further. To the extent that his statement was that he read  
7 a first couple paragraphs because the money award aspect was  
8 at the end.

9 THE COURT: I saw that.

10 MR. CURRAN: And there's some cases I understand  
11 that the jurors get put in that situation are afraid to say  
12 something even though their answer may be honest and  
13 legitimate that it didn't impact their deliberations, that's  
14 all I'm saying, it's not in the first two paragraphs.

15 THE COURT: I've already made findings. I'm not  
16 going to inquire more than the foreman, I won't inquire  
17 anything further of him either. The impact of what I did  
18 last night was that superseding cause in the case but only  
19 if the evidence presented warrants it.

20 MS. SCAPICCHIO: Judge, I'd ask for an offer of  
21 proof.

22 THE COURT: May I finish?

23 MS. SCAPICCHIO: I'm sorry.

24 THE COURT: Only if the evidence warrants it, so  
25 the question is I'm not going allow openings with respect to

1 damages. It seems to me it's a very short case, and I'd  
2 like to hear from you as to what you plan to present. Now,  
3 there was a memo the motion that you filed asking to limit  
4 the amount of damages which sort of --

5 MS. HARRIS: Yes.

6 THE COURT: Tell me, is that the nature of your  
7 case this morning -- what's the nature of your case?

8 MS. HARRIS: The nature of our case this morning  
9 is we're going to be calling Frannie O'Meara who was the  
10 supervisor of the homicide unit at the time, 1988 and 1989,  
11 and it's my understanding and expectation he's going to  
12 testify he was informed of Ricky Evans being housed in the  
13 hotel in a discussion with the head of homicide for the  
14 Boston Police Department and there was discussion about  
15 payment.

16 THE COURT: When?

17 MS. HARRIS: I don't know that he can tie it.

18 MR. CURRAN: I might be able to help. The timing  
19 is this, he got a call, he can't remember, he knows it was  
20 definitely after the Drumgold verdict. He's not sure if it  
21 was in between the Drumgold verdict and the Treas Carter  
22 plea. It could have been after but it was definitely at the  
23 end of December of '89, beginning of January.

24 THE COURT: What did he do with the information?

25 MR. CURRAN: He said his standard course of

1 conduct when he would meet with Dunford if it was not an  
2 expense that he was aware of that he knew already knew  
3 about, he would do two things, he would contact the trial  
4 prosecutor to confirm, then he'd call the first assistant  
5 because the first assistant was the person who wrote the  
6 checks.

7 THE COURT: Who was the trial prosecutor that he  
8 said would confirm?

9 MR. CURRAN: He's going to testify that he  
10 contacted Phil Beauchesne.

11 THE COURT: Is that right?

12 MR. CURRAN: Yes.

13 MR. REILLY: It is at best, I assume I can't  
14 remember any conversation with Beauchesne, and I can't  
15 remember anything he said or I said.

16 THE COURT: He will also say he was adequately  
17 prepared at the motion for new trial.

18 MR. REILLY: I think at his deposition.

19 THE COURT: Other than O'Meara, who's next, your  
20 guy is going to go first, other than O'Meara?

21 MS. HARRIS: That was the only person. I would  
22 push back of the knowledge of the trial prosecutor based on  
23 the Supreme Court jurisprudence that the district attorney's  
24 aware of this.

25 THE COURT: I think with respect to causation,

1 we're in a different issue, but the question is whether it  
2 was foreseeable to the person who received this information  
3 that it had not been disclosed in the Drumgold case and the  
4 only person who would have known whether it had been  
5 disclosed in the Drumgold case is Beauchesne, so we're  
6 dealing with this issue in a very different posture than we  
7 had at the beginning. Information that Connolly had it  
8 seemed to me doesn't necessarily mean that Connolly had a  
9 clue whether it had been disclosed in the Drumgold case.  
10 Likewise, with O'Meara, it's not at all clear that he would  
11 understand the implications of what he had.

12 MS. HARRIS: As the supervisor of the homicide  
13 unit.

14 THE COURT: The question, he would have known what  
15 would have been going on with Beauchesne, so it seems to me,  
16 it seems to me the question it's foreseeable that the person  
17 who had received it had not disclosed it, what steps he  
18 took, if he took steps, it would have been a different  
19 issue, it seems to me the steps would have been focused on  
20 the prosecutor.

21 The other thing, logically speaking, you're now  
22 talking about the jury finds that as of the moment of  
23 conviction this information had not been disclosed, so now  
24 you have to say that information that came up in connection  
25 with paying bills after the Drumgold trial, after the

1 Treas Carter plea, anyone having that information would have  
2 understood its significance.

3 Connolly with regard to the Treas Carter plea was  
4 dealing with a mopping up operation and not an appeal, so  
5 the question is whether Connolly would have at that moment,  
6 "Oh, my God, has this information been disclosed?" Did it  
7 have implications for Drumgold, 1; and 2, had it been  
8 disclosed, if that's the direction the evidence came, goes  
9 in, I'm not sure I'm going to allow you this instruction,  
10 but we'll have to see.

11 MR. CURRAN: Regardless of that issue though you  
12 can't take the evidence in a vacuum and saying what is  
13 O'Meara, the evidence is cumulative evidence. The jury  
14 could have found that Beauchesne knew but didn't know at the  
15 date of conviction and found out afterwards based on his  
16 testimony.

17 THE COURT: Absolutely.

18 MR. CURRAN: So it's a factual distinction, not a  
19 legal one.

20 THE COURT: I completely agree with you, which is  
21 why I gave you the superseding. You have the burden of  
22 proof. It's the burden of proof under Rule 50. If the  
23 testimony leads to the inference that Connolly knew about  
24 it, that it was expenses in the Treas Carter case, I'm not  
25 sure that at that point there's enough to suggest that

1 anyone would have believed it had implications for Drumgold  
2 which was then a live case, so we'll have to see. I'm  
3 giving you an opportunity to present your testimony. I  
4 imagine that Drumgold will go first.

5 MS. SCAPICCHIO: Yes.

6 THE COURT: Okay. You understand that what they  
7 can cross-examine on depends completely on what you ask.

8 MS. SCAPICCHIO: I do.

9 THE COURT: And if you begin to go far afield into  
10 innocence or guilt, the doors are then wide open.

11 MS. SCAPICCHIO: I understand.

12 MS. HARRIS: We had spoken about this when we  
13 began but there had been a proposal of jury instructions by  
14 the plaintiff talking about loss of reputation,  
15 humiliation.

16 THE COURT: I have concluded in that my  
17 instructions but I don't really know what he's going to say.  
18 Loss of reputation will also open doors.

19 MS. SCAPICCHIO: I understand. It's the 15 years  
20 that he spent in jail from the day he was convicted to the  
21 day he was released.

22 THE COURT: All right.

23 MS. HARRIS: Will we have a separate charge  
24 conference because I did file supplemental jury instructions  
25 after having received yours?

1                   THE COURT: Superseding.

2                   MS. HARRIS: Superseding and cumulative damages,  
3 and I would also in order, assuming you're going to allow  
4 the jury to consider superseding cause, I would want to have  
5 some instruction to them about what the duties are of a  
6 prosecutor's office, and I presented cases to you that talk  
7 about on the foreseeability issue which I didn't put in my  
8 instructions but are in the memo that I filed that it would  
9 not be foreseeable for normal error to occur in the normal  
10 conduct of one's official duties and that the cases that  
11 Wagenmann and Burke talking about misleading or active  
12 effort to deceive not being sufficient to break the causal  
13 chain.

14                  THE COURT: I saw that.

15                  MS. HARRIS: And I've also referred you to an  
16 Eleventh Circuit case that says if the prosecutor's office  
17 has from any source whether from the officer or anyone else  
18 that the decision by the prosecutor's not to act on it, even  
19 if it's inadvertent, he breaks the causal change.

20                  THE COURT: I looked at it very quickly. I'll  
21 certainly look at it again, but the question is whether or  
22 not the pre-conviction time is different than a post  
23 conviction time and not only a post conviction time but a  
24 time with two cases where information is coming up with a  
25 case that was a plea when the mopping up operation could

1 have led all the prosecutors involved to believe that this  
2 was just a question of a payment of a bill and had no other  
3 implications.

4 So the issues are going to be whether that's going  
5 to be what is shown or whether or not the alternative that  
6 they understood or someone, it was foreseeable for someone  
7 to understand the implications for Drumgold which had at  
8 that point been ended for over like four months. We'll see  
9 what the testimony is and I'll ask the jury about this  
10 question. We'll start -- we'll figure that the evidence  
11 will be finished --

12 MS. SCAPICCHIO: I'm hoping by 11:30.

13 MR. ROACHE: Judge, I'd ask that we address The  
14 Herald article yesterday?

15 THE COURT: Absolutely. I'm going to give them  
16 pointed --

17 MR. ROACHE: Even more so, your Honor, according  
18 to the articles as I read it Peter Gelzinis says that the  
19 diary contains hundreds of pages. I don't know how he  
20 received that information.

21 THE COURT: Let's do it here. Let's do it right  
22 now. Did either side, and I'll leave this neutral, did  
23 either side disclose any of the information, the Daley diary  
24 that was under seal?

25 MS. SCAPICCHIO: Not only did I note violate this

1 Court's protective order, when the reporter called me for a  
2 comment, I not only did not comment, I asked him not to run  
3 the story explaining to him I had worked for 20 years to get  
4 a jury verdict in this case and that I was concerned that  
5 the defendants would move for a mistrial if this story ran  
6 and asked him to speak to his boss about not running the  
7 story.

8 THE COURT: Nobody on this side released it?

9 MS. HARRIS: Did not release it.

10 MR. ROACHE: Your Honor, I find inconceivable that  
11 the Boston Herald has not been following this story from Day  
12 One and yet on the eve of the most important part of this  
13 case, the damages portion, that there are two articles that  
14 are run by the Boston Herald where Ms. Scapicchio is quoted  
15 and there is indicated --

16 MS. SCAPICCHIO: Quoted where? I am not quoted at  
17 all. Do not say I was quoted.

18 THE COURT: All right. I'm going to accept her  
19 representations as an officer of the court, period, and  
20 that's the end of it. So let's go back in.

21 ( LOBBY CONFERENCE WAS CONCLUDED.)

22 THE CLERK: All rise for the jury.

23 (Jurors entered the courtroom.)

24 THE COURT: Good morning, you can all be seated.  
25 You seem to be walking a little more slowly. First I want

1 to apologize, when the weather seems to turn, our heating  
2 overcompensates, so we called if that can be fixed.  
3 Needless to say we are dressed for yesterday's weather so we  
4 are all going to be uncomfortable together. I have a couple  
5 of questions to ask of you before we begin, and I'll tell  
6 you what beginning means.

7 First there was an article in the paper, as is not  
8 unusual after your findings, your verdict of last week, it's  
9 not unusual that there would be articles reporting that.  
10 Has anyone read any of the articles which reported on what  
11 you had done last week, the verdict in this case? Any  
12 affirmative responses? Okay.

13 Then in addition there were articles over the  
14 weekend, just one second, there was one on October 15th,  
15 then there were articles over the weekend there was an  
16 article in The Herald which was about this case.

17 Did anyone read that article or talk to anyone  
18 about that article? Okay. There may have been articles  
19 over the weekend and last week that talked not just about  
20 this case, the case involving Shawn Drumgold, but cases  
21 involving other civil rights cases against the  
22 Boston Police. Has anyone read, seen or heard anything  
23 about that apart from the inquiry we made of the jury last  
24 week, has anyone seen, heard or anything about that? What  
25 I'm talking about, not just articles that purport to talk

1 about the Drumgold case, the Tiffany Moore murder or Officer  
2 Callahan, but also articles that talk more broadly about the  
3 Boston Police and civil rights cases apart from what we  
4 discussed last week, no one has read, seen or heard anything  
5 along those lines? Okay.

6 Now, what we will be doing today, and it's my  
7 understanding that the evidence will be only today and that  
8 you'll have this stage of the case for your verdict and then  
9 your responsibilities will be over. I wanted to say that at  
10 the beginning looking at your faces. This stage of the  
11 proceeding involves determining the damages that flow from  
12 your verdict of last week.

13 Before I turn, before I instruct you on the  
14 standard for determining damages, which I will do at the end  
15 of this morning's proceedings, I just wanted to put this in  
16 context for you. You have already decided the question of  
17 Officer Callahan's liability in two respects, withholding  
18 exculpatory evidence about hotel and food and the payment of  
19 \$20.

20 Another jury, ladies and gentlemen, will determine  
21 whether the other defendants in this case, namely the City  
22 of Boston and Police Commissioner Francis Roache, are liable  
23 for any constitutional violations. Because of the timing  
24 here, we will not ask you to determine those questions,  
25 another jury will answer those questions.

In this proceeding, you'll decide the amount of damages to be awarded to Mr. Drumgold, but bear in mind that there will only be a single award for Mr. Drumgold. The remaining defendants, who will be the subject of another jury, may also be responsible for the compensatory damages that you have awarded but only if they are found liable.

7                   So today you will be asked to determine damages,  
8 and I'll instruct you what that consists of. The  
9 responsibility of these two other defendants for that same  
10 amount of damages will be determined by another jury. You  
11 will focus only on damages here. We want to say this to  
12 people so they don't think there are multiple awards, it's  
13 one amount of damages which you will determine if you find  
14 it is appropriate.

15 So with that we will begin.

16 MS. SCAPICCHIO: Thank you, your Honor. The  
17 plaintiff calls Shawn Drumgold.

18 SHAWN DRUMGOLD, having been duly sworn by the  
19 Clerk, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. SCAPICCHIO:

22 | THE COURT: Proceed.

23 Q. Good morning. In a loud clear, voice, Shawn, could you  
24 please state your name for the record.

25 A. Shawn Drumgold.

1 Q. Could you move that microphone closer to you, Shawn.

2 Thank you. And, Shawn, where are you living now?

3 A. 181 Stratton Street.

4 Q. Who did you live there with?

5 A. With my mother and my niece.

6 Q. And are you married?

7 A. Yes.

8 Q. Who are you married to?

9 A. Rochelle Drumgold.

10 Q. And do you have any children?

11 A. Yes.

12 Q. How many children do you have, Shawn?

13 A. Four.

14 Q. And can you tell the jury the names and the ages of your  
15 children?

16 A. Rowshana, she's 26; Shawn, Jr., he's 24; Karen Kyara,  
17 she's 24; and Kiamoni, he's 4.

18 Q. What's the last one?

19 A. Kiamoni.

20 Q. He's four?

21 A. Yes.

22 Q. Shawn, I'm going to direct your attention to, first of  
23 all, do you know the date you were convicted?

24 A. Yes.

25 Q. What was the date of your conviction?

1 A. October 13th, 1989, Friday.

2 MS. SCAPICCHIO: And if I may, your Honor, I'd  
3 like to read the sentence into the record.

4 THE COURT: Yes, you may.

5 Q. This is October 13th, 1989. "The Commonwealth moves for  
6 sentencing by Mr. Beauchesne." The clerk: "Shawn Drumgold,  
7 please rise. Shawn Drumgold, the jury having returned a  
8 verdict of guilty, the Court in consideration of your  
9 offense as set forth on the Indictment No. 071882 sentences  
10 you to be committed to the Massachusetts Correctional  
11 Institute at Cedar Junction for and during the term of your  
12 natural life. The Court will have deemed you have served  
13 whatever time spent in custody awaiting disposition of this  
14 matter. You have a right of appeal pursuant to Mass. Rules  
15 of Criminal Procedure 28. You stand committed, sir."

16 Shawn, do you remember the day you were  
17 convicted?

18 A. Yes.

19 Q. Can you tell the jury what happened after that sentence  
20 was imposed?

21 A. After that sentence was imposed, I was taken to the back  
22 of the courthouse, I was shackled, they put chains around my  
23 waist, once in handcuffs, they put shackles around my legs  
24 and escorted me to Walpole.

25 Q. When you say Walpole, what is Walpole?

1 A. Maximum state prison.

2 Q. How did you get to Walpole?

3 A. They drove me in a car.

4 Q. Do you remember driving up to Walpole state prison  
5 October 13th of 1989?

6 A. Yes.

7 Q. Can you tell the jurors what you remember about driving  
8 up to Walpole state prison October 13th of 1989?

9 A. When we first got to Walpole what I had recognized was a  
10 big white wall, it was 30 feet tall, and when I saw the  
11 wall, I knew basically what it was, it was Walpole, and when  
12 we got to Walpole, we went inside a door, and when we  
13 entered into the door, the door closed, and there was a guy  
14 in the trap. When I looked up, it was about as high as this  
15 ceiling, and he was pointing down with a shotgun.

16 Q. And how did that make you feel, Shawn?

17 A. Scared. I was terrified.

18 Q. And where did you go from that trap?

19 A. From that trap, they bring me into Walpole, and they  
20 brought me to the hospital unit.

21 Q. Okay. And where is the hospital unit in relation to the  
22 other units at Walpole state prison?

23 A. The hospital unit is outside the visiting room.

24 Everyone that comes into Walpole state prison, you have to  
25 go to the hospital unit first to be checked in before you

1 enter into the institution.

2 Q. Were you physically brought to the hospital unit by some  
3 corrections officer?

4 A. Yes.

5 Q. Tell us where physically they placed you within the  
6 hospital unit.

7 A. They placed me in a cell in the hospital unit.

8 Q. Could you describe that cell for the jurors, please.

9 A. The cell was a three feet by six cell, it had a bed in  
10 it and a toilet with a sink on the top.

11 Q. Could you describe the bed for the jurors.

12 A. The bed was a metal bed, a metal slab. It was stuck on  
13 the wall, and it had a green mattress.

14 Q. Okay. And at some point in time did the corrections  
15 officer who escorted you to that cell leave?

16 A. Yes.

17 Q. What did you do when they left?

18 A. I put my head down and I cried.

19 Q. You what?

20 A. I cried.

21 Q. And how long did you cry that day?

22 A. I cried all that day. I was in the cell for about an  
23 hour, hour and a half, and then my family came up to  
24 visit.

25 Q. Okay. Did someone notify you that you were going

1 somewhere else?

2 A. Yes, an officer came and told me that I had a visit.

3 Q. And were you escorted to the visiting room?

4 A. Yes.

5 Q. What happened before you went into the visiting room?

6 A. When I went into the visiting room, they strip searched  
7 me, they made me take off all my clothes, they checked my  
8 mouth, my ears, they made me spread my butt cheeks, lift up  
9 my testicles, my feet, then they told me I could get dressed  
10 and go into the visiting room.

11 Q. When you got to the visiting room, who was there?

12 A. My wife, my mother, my brother, my daughter.

13 Q. And what did you see -- well, what happened in that  
14 visiting room? Did you visit?

15 A. Yes. When I was in the visiting room --

16 Q. For how long?

17 A. I think it was like close to, I think it was like six or  
18 seven hours.

19 Q. That you visited that day?

20 A. Yes.

21 Q. And what happened at the end of the visit?

22 A. At the end of the visit, my daughter, she didn't want to  
23 leave. It was kind of difficult for her. No one wanted to  
24 leave. They didn't want to leave me behind.

25 Q. And were you crying during that visit?

1 A. Yes.

2 Q. Were they crying during that visit?

3 A. Yes.

4 Q. And at some point did that visit end?

5 A. Yes.

6 Q. And where did you go when that visit ended?

7 A. I went back into the institution and they strip searched  
8 me and took me through the procedure all over again and  
9 bring me back to the hospital unit.

10 Q. And how long did you stay in the hospital unit, Shawn?

11 A. I got there on a Friday so I stayed there through the  
12 weekend. Monday morning I was brought into an orientation  
13 unit.

14 Q. And could you explain to the jurors what an orientation  
15 unit is?

16 A. Orientation unit is the first unit for new men when you  
17 first get into Walpole.

18 Q. When you say the first unit for new men, what does that  
19 mean?

20 A. As soon as you come into the institution, it's a unit --

21 Q. Before you get classified?

22 A. -- before you get classified.

23 Q. Now, Shawn when you were brought to the orientation unit  
24 shortly after October 13th, 1989, did something happen?

25 A. Yes.

1 Q. Can you tell the jurors what happened?

2 A. When I was brought into the unit, there was a lot of  
3 guys and stuff in the unit. It's 45 men in a cell, in the  
4 unit. Each cell has 45. There's 45 cells so guys was  
5 calling me a chow killer, that's the guy that got convicted,  
6 he killed two little girls, he's a piece of shit and stuff  
7 like that.

8 Q. And, Shawn, can you describe your first visit? Well,  
9 first of all, where did you eat your meals in prison?

10 A. In the chow hall.

11 Q. And can you describe for the jury your first experience  
12 in the chow hall at MCI-Cedar Junction?

13 A. My first experience in the chow hall, when I entered  
14 into the chow hall, we end up going double in the double  
15 line, then when you get into the chow line, you get into a  
16 single line and you grab a tray. The chow hall, it's very  
17 big, and I don't know how many seats it housed, but it's a  
18 large place.

19 When you get your trays, everyone is like falling  
20 in line to get their food and then you head into a seat.  
21 When you get into the chow hall and you go try to sit down  
22 at a table, guys are always saying this seat is taken, and  
23 they're moving you from one place to another, and if you sit  
24 down in someone's seat, you can get stabbed, you can get  
25 hurt really bad in there.

1 Q. The first day that you described when you got to the  
2 chow hall after you were convicted on October 13th, 1989,  
3 were you able to find a seat?

4 A. No.

5 Q. How did you eat your meals?

6 A. I eat standing up, and then the staff, that you're  
7 supposed to sit down and eat, so they move you. If you  
8 can't find a seat, you got to keep moving, so I ate as fast  
9 as I could on my way to the trash can, and I dumped it, and  
10 I kept going back to the unit.

11 Q. And, Shawn, at some point were you moved to a regular  
12 block?

13 A. Yes.

14 Q. And can you describe for the jury what the regular  
15 blocks at MCI-Cedar Junction looked like?

16 A. A regular block is a similar cell. It's a 3 by 6 cell,  
17 but it has a desk in it so when you're sitting in the cell,  
18 you have like maybe a foot and a half to the desk and it has  
19 a toilet in it and a bed stuck to the wall, a green plastic  
20 mattress.

21 Q. And, Shawn, could you stand up for the jury and pace out  
22 how many steps you could take in that cell?

23 A. Like if you're going this way, it would be three steps,  
24 one, two, three.

25 Q. And what would happen at that, you hit the wall?

1 A. You hit the wall.

2 Q. What type of wall was that, Shawn?

3 A. Cement wall.

4 Q. How about coming forward?

5 A. Then when you come forward, you take 1, 2, 3, 4, 5, 6,  
6 then you stop here and you hit bars.

7 Q. Could you resume the stand, please. Shawn, from  
8 October 13th of 1989 until you were released in November of  
9 2003, how many days did you spend in jail?

10 A. 5,182 days.

11 Q. 5,182?

12 A. Yes.

13 Q. And, Shawn, if you could, could you take the jurors  
14 through a day at MCI-Cedar Junction. What happens? What  
15 time, first of all, how do you wake up in the morning?

16 A. In the morning, the lights come on. There are blocks,  
17 some bright lights, and they make -- it's a horn that goes  
18 off to let everyone know that it's getting ready to be count  
19 time.

20 Q. Stop right there. What is count time?

21 A. Count time is where an officer comes by and counts  
22 everybody and each block in the whole institution does the  
23 same thing.

24 Q. How many counts do you have a day while you're in  
25 prison?

1 A. About four.

2 Q. Four counts a day?

3 A. Yes.

4 Q. So the first count is first thing in the morning?

5 A. Yes.

6 Q. How much time do you have between when that loud sound  
7 happens and count happens?

8 A. We have five minutes.

9 Q. What do you have to do during that five-minute period?

10 A. You throw your clothes on and you brush your teeth and  
11 you stand by the bars and the officer counts you.

12 Q. And the officer counts you?

13 A. Yes.

14 Q. And what happened after you've been counted and the  
15 count clears?

16 A. After the count clears --

17 Q. Wait a minute, why don't you tell the jury what it means  
18 for the count to clear.

19 A. The count to clear, once all the inmates in the whole  
20 entire institution is counted, then the count is cleared for  
21 movement, and once the count is cleared, they open the cell  
22 up, and the first thing that you do is go to chow.

23 Q. And how do you get to chow?

24 A. You walk.

25 Q. And physically how do you get from your cell block to

1 the chow?

2 A. Each block is called for chow so you come out your cell  
3 and you exit out the unit, and the whole block goes together  
4 into the chow hall.

5 Q. So you march down to the chow hall?

6 A. Yes.

7 Q. And how long do you get to eat in the chow hall?

8 A. Maybe two or three minutes.

9 Q. From the time the chow is called until you're back to  
10 your cell, how much time has usually passed?

11 A. Probably about 20 minutes.

12 Q. From the time they call chow to your unit until you have  
13 to get back to your unit is 20 minutes?

14 A. Yes.

15 Q. And that includes the time you have to march down there,  
16 eat your food and march back?

17 A. Yes.

18 Q. What happens after you're marched back after chow?

19 A. When you're coming back, there's correctional officers  
20 posted all the way to each unit.

21 Q. When you get back to your unit, are you locked in your  
22 cell again?

23 A. Yes, you get locked back in your cell.

24 Q. Then you had mentioned something about movement. Can  
25 you tell the jury what movement is within a prison system?

1 A. Movement in a prison system is 9:00 movement, it's like  
2 it opens, whatever part of the institution is opened that  
3 you can go to those areas, it's like school, the library,  
4 gym, whatever.

5 Q. Okay. And are different portions of the institution  
6 open for movement at different times of the day?

7 A. Yes.

8 Q. Okay. And during that movement period, is that the time  
9 period that you shower and you make phone calls as well?

10 A. Yes.

11 Q. Can you tell me how many showers are typically on a tier  
12 in the Walpole system?

13 A. For 45 inmates, there's three showers.

14 Q. And when we talk about phone calls, how did you make  
15 phone calls in prison?

16 A. You had to stand in line. Each block holds 45 inmates,  
17 and there's two phones in a block so as the blocks are open  
18 up for movement, if you make movement or you stay in a  
19 block. If you stay in a block, everyone has to stay in line  
20 to get on the phone.

21 Q. How do you place calls, they're collect?

22 A. Yes, they're collect calls. It's a long wait to get on  
23 the phone because it's so many inmates.

24 Q. Other than the movements period that you have during the  
25 day where you shower, you make phone calls, how many hours a

1 day are you typically locked in your cell?

2 A. About 16 hours a day.

3 Q. Sixteen hours a day?

4 A. Yeah.

5 Q. Now, Shawn, I'm going to ask you in your first days at  
6 Walpole state prison after your conviction on October 13th  
7 of 1989, did you witness any violence?

8 A. Yes.

9 Q. Can you tell the jury the first instance that you  
10 witnessed at MCI-Cedar Junction.

11 A. The first incident, it was one shared block is being  
12 called for movement, you have to go to your officer and get  
13 a pass to the designated area you're going to, so I was  
14 going to the yard, so I got a pass to go to the yard.

15 Q. And let's stop right there. Let's explain to the jury  
16 what the yard is.

17 A. The yard is one of the most dangerous parts of the  
18 prison.

19 Q. Why is that, Shawn?

20 A. Because that's where most of the stuff happens out in  
21 the open, you're like caged in, a fenced area, and it's like  
22 where people congregate, all different nationalities.

23 Q. And is that the only place you get fresh air?

24 A. Yes.

25 Q. And you got a pass to the yard this day?

1 A. Yes.

2 Q. And what happened?

3 A. On the way going to the yard, my block was being called  
4 so we was going in. There was a guy that was coming in.

5 Q. When you say your block was called, were you in a  
6 line?

7 A. Yes.

8 Q. Same type of line you were in when you went to chow?

9 A. Yes.

10 Q. Marching towards the yard?

11 A. Yes.

12 Q. And then what happened?

13 A. A guy was coming against our movement.

14 Q. When you say against your movement, tell the jury what  
15 you mean.

16 A. We were walking straight on the right-hand side and he  
17 was coming on the left-hand side.

18 Q. What happened when you saw him come on the left-hand  
19 side?

20 A. It seemed, it looked like what he appeared he was  
21 punching the guy, then the guy fell down so we all kept  
22 going.

23 Q. He punched a guy?

24 A. It was like he was punched.

25 Q. Did you later find out what happened?

1 A. He was stabbed.

2 Q. Did you stop to help him?

3 A. No.

4 Q. Why not?

5 A. It's one of the things you don't do in prison.

6 Q. Now, Shawn were you ever assaulted while you were in  
7 MCI-Cedar Junction?

8 A. Yes.

9 Q. Can you tell the jury about the first assault.

10 A. The first assault, I was in my cell, the first incident  
11 happened, it was like three or four inmates came in to the  
12 cell, and they was saying, "He's the piece of shit, he  
13 killed a little girl," there was talk about hurting me and  
14 there was punching and kicking, and I sustained a lot of  
15 bruises and stuff like that.

16 Q. So they came into your cell. Did you try to defend  
17 yourself?

18 A. No.

19 Q. Why not?

20 A. Because I was scared.

21 Q. And what bruises did you suffer as a result of that  
22 beating? First of all, how long did the beating last?

23 A. Probably about 10, 15 minutes.

24 Q. Okay. And what were you doing, physically doing? Three  
25 or four inmates were beating you at MCI-Cedar Junction?

1 A. I was protecting my head.

2 Q. How were you doing that? Tell the jury.

3 A. I was curled in a fetus position, and I was trying to  
4 block my head.

5 Q. Did you say anything back to them?

6 A. No.

7 Q. At some point did the beating stop?

8 A. Yes.

9 Q. What did you do when the beating stopped?

10 A. I got up and tried to clean myself and act like nothing  
11 happened.

12 Q. Did you report the beating?

13 A. No.

14 Q. Why did you try to act like nothing happened?

15 A. Because I didn't want to get anyone in trouble, they  
16 call me a snitch. In prison, if you're called names like  
17 that, a snitch, if you're telling on somebody, you can get  
18 hurt really bad from that.

19 Q. You thought you'd get hurt worse if you told?

20 A. Yes.

21 Q. Were you assaulted at any other time while you were at  
22 MCI-Cedar Junction?

23 A. Yes.

24 Q. Where were you the second time you were assaulted at  
25 MCI-Cedar Junction?

1 A. The second time I was in the library, I was down the  
2 library asking for copies and stuff in the machine and some  
3 guys came and jumped on me, and they were kicking and  
4 stomping me.

5 Q. When you say kicking and stomping, where were they  
6 kicking and stomping?

7 A. All over my body.

8 Q. What were you doing?

9 A. I was trying to defend myself, I was trying to block the  
10 hits.

11 Q. And at some point during that beating did you lose  
12 consciousness?

13 A. Yes.

14 MR. ROACHE: Your Honor, I object to leading  
15 questions.

16 THE COURT: Sustained.

17 Q. Tell us what happened during that beating.

18 A. During -- what I remember is someone hit me in the back  
19 of the head, I was trying to block the hits from hitting me,  
20 I fell down, and that's all I remember from that. When I  
21 woke up, there was some correctional officers and staff  
22 nurse over me.

23 Q. Were you bleeding?

24 A. Yes.

25 Q. Where were you bleeding from at that point?

1 A. My mouth, my nose.

2 Q. All right. And was that the last time you were  
3 assaulted at MCI-Cedar Junction or was there another  
4 assault?

5 A. That was the last.

6 Q. Okay. At some point were you transferred to  
7 MCI-Norfolk?

8 A. Yes.

9 Q. And was the cell at MCI-Norfolk -- let me ask you this,  
10 were the restrictions that were placed on you at MCI-Cedar  
11 Junction, it was the same 16 hours you spent at Norfolk and  
12 all the other state prisons?

13 A. Yes.

14 Q. And every day was the same, movement for chow and the  
15 various movements during the day?

16 A. Yes.

17 Q. And other than that you were locked in your cell?

18 A. Yeah.

19 Q. Now, at MCI-Norfolk, can you describe for the jury  
20 whether or not you were ever assaulted while you were at  
21 MCI-Norfolk?

22 A. Yes.

23 Q. And can you tell the jury what happened during that  
24 assault?

25 A. When I was in Norfolk, MCI-Norfolk, when you first get

1 to Norfolk, it's like Norfolk's orientation, it's a dorm  
2 type area when you first come in. I was jumped in the dorm  
3 area.

4 Q. When you say jumped, Shawn, what happened to you?

5 A. A bunch of guys jumped and were stomping on me, calling  
6 me a piece of shit saying I killed a little girl.

7 Q. How long did that beating last?

8 A. I don't know.

9 Q. Did something happen after that beating, the next day?  
10 Let me ask you this, after that beating, did you do anything  
11 to clean up?

12 A. Yes.

13 Q. What did you do?

14 A. What I did, I put a longjohn shirt on.

15 Q. Why did you put a longjohn shirt on?

16 A. Because what happened is once I cleaned up, I didn't  
17 want no one to see the bruises and stuff so I covered the  
18 bruises with my shirt.

19 Q. Okay. And the next day did you get a visit?

20 A. Yes.

21 Q. Who did you get a visit from?

22 A. I got a visit from you.

23 Q. And during that visit, do you remember lifting up your  
24 shirt?

25 A. Yes.

1 Q. Do you remember lifting up the thermal on your arm?

2 A. Yes.

3 Q. Can you tell the jury how long that visit lasted that  
4 day?

5 A. That visit lasted almost about seven hours.

6 Q. It was unusual for your lawyer to stay there for seven  
7 years?

8 A. Yes.

9 Q. Why so long, Shawn?

10 A. Because I was scared and I really didn't want to go back  
11 into the institution, and I didn't know what to do.

12 Q. Now, Shawn, from Norfolk, were you transferred to Old  
13 Colony Correctional Center?

14 A. Yes.

15 Q. Is that another state prison within Massachusetts?

16 A. Yes.

17 Q. And the prison routine, did that apply in Old Colony  
18 Correctional Center as well?

19 A. Yes.

20 Q. Three meals a day, 20 minutes a day to eat your meals;  
21 is that right?

22 A. Yes.

23 Q. And locked in your cell 16 hours a day?

24 A. Yes.

25 Q. And at Old Colony, were you ever assaulted?

1 A. Yes.

2 Q. And can you tell the jury about that assault.

3 A. Old Colony was the same, when I was in the new man unit,  
4 when I came in, there was like three or four guys jump me in  
5 the cell, and I had a bunch of bruises on my back and my  
6 stomach area.

7 Q. And did you report that beating?

8 A. No.

9 Q. And did you clean up from that beating?

10 A. Yes.

11 Q. And, Shawn, while you were in prison, did you get your  
12 G.E.D.?

13 A. Yes, in 1995.

14 MS. SCAPICCHIO: May I approach the witness, your  
15 Honor?

16 THE COURT: Yes, you may.

17 Q. Do you recognize that certificate, Shawn?

18 A. Yes.

19 Q. What do you recognize that to be?

20 A. This is my G.E.D. certificate.

21 Q. Okay. And how long did you work to get your G.E.D.  
22 while you were in prison, Shawn?

23 A. Five years.

24 Q. Five years?

25 A. Yeah.

1 MS. SCAPICCHIO: Your Honor, I move to introduce  
2 this.

3 THE COURT: Any objection?

4 MR. CURRAN: No objection, your Honor.

5 THE COURT: It may be admitted.

6 ( Shawn Drumgold's G.E.D. certificate was marked  
7 and admitted into evidence as Exhibit No. 1.)

8 Q. Now, Shawn we talked a little bit about the first visit  
9 you had right after your conviction. Can you tell the  
10 jurors what the procedure was for your family to come and  
11 visit you at any of the various institutions you were locked  
12 up in?

13 A. The same routine like I am, when my family came to visit  
14 me, they had to sign a paper for visitor's form to come in,  
15 and then when they came in, they were subject to the same  
16 searches, pat searches and stuff like that that we were.

17 Q. They weren't cavity searches, they were just pat  
18 searches?

19 A. Pat searches, but there was also times that they can  
20 make the women pull their bras out.

21 MR. CURRAN: Objection, your Honor.

22 THE COURT: Overruled. Go on.

23 A. They have mirrors where they can check for cavity  
24 searches and stuff like that so that they make sure no one  
25 brings no contraband, anything into the institution.

1 Q. And when your family came to visit you, those 5,182 days  
2 that you were incarcerated, did they have to go through the  
3 same routine to get into the institution each time?

4 A. Yes.

5 Q. And at some point -- well, how often did your wife visit  
6 you while you were incarcerated?

7 A. In the beginning, it was like, you know, two or three  
8 times a week, but then as time went on, my daughter when I  
9 first went in, when I first got locked up, she was five and  
10 a half months, so when I got sentenced, she was like almost  
11 two, so as time went on she was getting older and school and  
12 stuff like that so the visits changed, it went from two or  
13 three times a week to once a week to every other week to  
14 once a month, and as the years went on, it changed. My  
15 daughter got older, she was developing, and she was started  
16 to go through the process as adults do in prison with the  
17 searches.

18 Q. So she was beginning to get pat searched?

19 A. Yes.

20 Q. And what happened when she started to get pat  
21 searched?

22 A. She was feeling reluctant to come.

23 Q. She didn't want to visit?

24 A. No.

25 Q. Because she didn't want to go through the pat search?

1 A. Yes.

2 Q. Now, when you were convicted in October, the 13th of  
3 1989, were you married at that time, Shawn?

4 A. When I first got convicted, no.

5 Q. Did you get married at some point?

6 A. Yes.

7 Q. When did you get married?

8 A. I got married February 11th, 1990.

9 Q. And were you in jail at the time?

10 A. Yes, MCI-Walpole.

11 Q. Where were you married?

12 A. In Walpole, MCI-Walpole, City Junction.

13 Q. And how long was your wedding ceremony in jail?

14 A. It was like seven or eight minutes, they called us in  
15 before the visits.

16 Q. And you were married in a civil ceremony?

17 A. Yes.

18 Q. And what happened right after you were married to your  
19 wife Rochelle?

20 A. After I was married, I had to exit back out the visiting  
21 room, go through the strip search procedure and wait for the  
22 visits to be called out to come out to the visiting room  
23 again.

24 Q. Do you have any pictures of your wedding?

25 A. No.

1 Q. Shawn, do you remember or could you tell the jury  
2 whether or not when you were on visits with your family if  
3 you got the opportunity to take any photographs?

4 A. Yes.

5 Q. All right. Can you tell the jury what you had to do in  
6 order to take photographs while you were in prison?

7 A. In prison, you could work in there, you get a dollar a  
8 day, so I used to have to save up my money to help get some  
9 of the pictures in the early parts of my sentence, I didn't  
10 have the money, and what little bit you have canteen where  
11 you can get cosmetics and food and stuff like that, but I  
12 used to have to save up for the pictures so I could take  
13 them of my family.

14 Q. When you say pictures, where is the picture actually  
15 taken at the various institutions?

16 A. In the visiting room.

17 MS. SCAPICCHIO: Can I use the document camera,  
18 your Honor?

19 THE COURT: Yes.

20 Q. Can you see that on the screen in front of you, Shawn?

21 A. Yes.

22 Q. And can you tell the jury what that's a photograph of?

23 A. That's a photograph of me, my wife and my daughter  
24 Kyara.

25 Q. And was that shortly after you were convicted on

1       October 13th, 1989?

2       A.   Yes.

3       Q.   And how old is Kyara in that picture?

4       A.   She's like 18 months.

5       Q.   Shawn, do you remember where that picture was taken?

6       A.   Yes.

7       Q.   Where is that?

8       A.   That picture is at MCI-Norfolk.

9       Q.   And how old is your daughter Kyara in that picture?

10      A.   In that picture she was like three or four.

11           MS. SCAPICCHIO: Your Honor, I'd move to introduce  
12          the first picture and this picture.

13           THE COURT: It may be admitted.

14           ( Photographs were marked and admitted into  
15          evidence as Exhibit Nos. 2 and 3.)

16      Q.   Shawn, could you tell the jury who's in that picture?

17      A.   That's my mother, me, my wife and my daughter.

18      Q.   And do you remember where that picture was taken?

19      A.   That picture was taken at Old Colony Correctional  
20          Center.

21      Q.   And how old is Kyara in that picture?

22      A.   She was like five years old in that picture.

23      Q.   Shawn, do you remember how you spent holidays while you  
24          were in jail?

25      A.   Yes.

1 Q. Did you spend them with your family?

2 A. No.

3 Q. How did you spend them?

4 A. If a holiday fell on a weekday like Thanksgiving mostly  
5 is the third Thursday of the month, we would celebrate it on  
6 a weekend in the visiting room.

7 Q. Let's talk about the actual holiday, the holiday itself,  
8 how did you spend that?

9 A. I spent it on the phone by myself.

10 Q. And was the prison staff reduced staff on holidays?

11 A. Yes.

12 Q. So if you didn't have a visit, what happened?

13 A. If you didn't have a visit, you basically stayed in your  
14 cell.

15 Q. You were locked in your cell all day?

16 A. Most of the day.

17 Q. And that was because there was a reduced staff on  
18 holidays?

19 A. Yes.

20 Q. Shawn, you talked about spending Christmas with your  
21 family. Is this picture representative of how you spent  
22 Christmas with your family?

23 A. Yes.

24 Q. Can you explain to the jury what is depicted in this  
25 picture?

1 A. In the visiting room this was another picture at Old  
2 Colony Correctional Center. Christmas would happen it  
3 didn't fall on the same day, so what happened, that Saturday  
4 my wife and my daughter came up to visit me, and we spent  
5 that -- we celebrated Christmas on a Saturday so we bought  
6 like sandwiches.

7 Q. They were just from the vending machine?

8 A. Yes, from the vending machine. My wife, she wouldn't  
9 let Kyara eat candy, so I used to sneak her candy, and we  
10 bought like chips and stuff like that, sodas and that. This  
11 was the memorable time that I could remember so I would save  
12 my money up to take pictures with them so that we can have  
13 some memories.

14 MS. SCAPICCHIO: Your Honor, I'd move to introduce  
15 this photograph as well.

16 THE COURT: It may be admitted.

17 (Photograph was marked and admitted into  
18 evidence as Exhibit No. 4.)

19 Q. Do you remember where that photograph was taken,  
20 Shawn?

21 A. Yes.

22 Q. Where is that?

23 A. That's at Bay State Correctional Center.

24 Q. And how old is Kyara in that picture? First of all,  
25 who's in that picture?

1 A. That's my wife, Rochelle, and Kyara.

2 Q. And how old is Kyara in that picture?

3 A. Kyara is like eight years old in that picture.

4 MS. SCAPICCHIO: I move to introduce that, your  
5 Honor.

6 THE COURT: It may be admitted.

7 ( Photograph was marked and admitted into  
8 evidence as Exhibit No. 5.)

9 Q. Do you ever remember an occasion, Shawn, where in the  
10 5,182 days that you were incarcerated that you actually got  
11 to share a meal with your family?

12 A. Yes, like Thanksgiving and stuff like that we would have  
13 some --

14 Q. And do you remember -- let me show you this. Who's in  
15 that picture?

16 A. That's my daughter, my nephews, my two nephews came up  
17 to see me, that was my first time seeing them, and my  
18 brother Darryl and my big brother Steve.

19 Q. And was that an occasion that you remember that you  
20 actually got to share a meal with your family in the 5,182  
21 days you spent in jail?

22 A. Yes.

23 Q. And did you keep that picture throughout the years?

24 A. Yeah.

25 MS. SCAPICCHIO: I'd move to introduce this

1 picture, your Honor.

2 THE COURT: It may be admitted. Go on.

3 ( Photograph was marked and admitted into  
4 evidence as Exhibit No. 6.)

5 Q. Now, in addition to the photographs you took while you  
6 were at the institution, did you actually receive  
7 photographs from your wife during your incarceration?

8 A. Yes. That's my daughter, her name is Karen Kyara, we  
9 call her Kiki. That was her first time on the phone with me  
10 that she was like -- that I got the first picture I got with  
11 the phone on me, she was talking to me on the phone.

12 Q. So when she talked to you at jail, your wife took a  
13 picture for you?

14 A. Yes.

15 Q. And sent it to you?

16 A. Yes.

17 MS. SCAPICCHIO: I'd move to introduce that photo,  
18 your Honor.

19 THE COURT: It may be admitted.

20 ( Photograph was marked and admitted into  
21 evidence as Exhibit No. 7.)

22 Q. Shawn, do you know what this picture is?

23 A. Yes, this is another picture of me talking to her on the  
24 phone. She always asks all the time when I was talking to  
25 her on the phone is, "When you coming home, daddy?"

1 Q. What's that?

2 A. She's always asking, "When you coming home, daddy?"

3 That's one of the pictures that she was having a hard time  
4 with me not being there.

5 MS. SCAPICCHIO: I'd move to introduce that.

6 THE COURT: It may be admitted.

7 ( Photograph was marked and admitted into  
8 evidence as Exhibit No. 8.)

9 Q. Do you know what that's a photograph of, Shawn?

10 A. Yes.

11 Q. What's that a photograph of?

12 A. That's a birthday card. My daughter took a picture of  
13 it.

14 Q. A card that she was sending to you?

15 A. Yes.

16 Q. And then your wife took a picture of her sending that  
17 card to you?

18 A. Yes. You can see, if you can see, there's some writing  
19 on there, she used to write little things for me on the  
20 card.

21 MS. SCAPICCHIO: I'd move to introduce that photo,  
22 your Honor.

23 THE COURT: It may be admitted.

24 ( Photograph was marked and admitted into  
25 evidence as Exhibit No. 9.)

1 Q. Do you know what that's a photo of, Shawn?

2 A. Yes.

3 Q. What's that a photo of?

4 A. That's Kyara's kindergarten graduation, and that's her  
5 great grandfather, Grandpa Billy, he passed away, God bless  
6 him.

7 Q. Were you able to attend her kindergarten school  
8 graduation?

9 A. No.

10 Q. Is that the only memory you have of her kindergarten  
11 school graduation?

12 A. Yes, and that's the only picture I have of  
13 Grandpa Billy.

14 MS. SCAPICCHIO: I move to introduce that, your  
15 Honor.

16 THE COURT: It may be admitted.

17 ( Photograph was marked and admitted into  
18 evidence as Exhibit No. 10.)

19 Q. Shawn, can you tell us what's depicted in the next  
20 photograph?

21 A. Yes, that's a picture of Kyara brushing her teeth. Her  
22 mother didn't want her eating candy, so we used to always  
23 kid her about brushing her teeth and stuff like that, and  
24 she was showing me that she was brushing her teeth.

25 Q. And is that how you kept apprised of your daughter's

1 daily activities, you would get these photographs in the  
2 mail every once in awhile?

3 A. Yes.

4 MS. SCAPICCHIO: I'd move to introduce that, your  
5 Honor.

6 THE COURT: It may be admitted.

7 ( Photograph was marked and admitted into  
8 evidence as Exhibit No. 11.)

9 Q. Shawn, can you tell us what's depicted in the next  
10 photo?

11 A. This is Kyara in bed.

12 Q. And why did you get a picture of Kyara in bed?

13 A. Because she wanted me to read to her. She always used  
14 to say I can't wait until you get a chance to read me a book  
15 to bed at night, so she sent me a picture.

16 Q. Did you have a chance during those 5,182 days that you  
17 spent in jail to tuck your daughter in?

18 A. No.

19 Q. Did you have a chance to give her a kiss goodnight  
20 during those times?

21 A. No.

22 Q. Is this one of the only pictures you have of her in  
23 bed?

24 A. Yes.

25 Q. And did you keep that through all these years?

1 A. Yes.

2 Q. Can you tell the jury --

3 MS. SCAPICCHIO: I'd move to introduce the next  
4 photo, your Honor, the last photo, I should say.

5 THE COURT: It may be admitted.

6 (Photographs were marked and admitted into  
7 evidence as Exhibit Nos. 12, 13 and 14.)

8 Q. Shawn, can you tell us what's depicted in this photo?

9 A. This is Kyara going to school. This is the first  
10 time -- I didn't know what a backpack was. She was trying  
11 to explain what a backpack was. We had like little duffle  
12 bags that had the little straps, we used to carry them when  
13 I was growing up. She kept telling me that she had a  
14 backpack and she put her books and lunch and stuff in there  
15 to go to school, so this is her showing me.

16 Q. So you had conversations with your daughter about how  
17 she carried her books to school?

18 A. Yes.

19 Q. Were you able to walk your daughter to school on any  
20 occasion --

21 A. No.

22 Q. -- during her grammar school?

23 A. No.

24 Q. And is this the first time you understood what she was  
25 talking about when she was talking to you about backpacks?

1 A. Yes.

2 Q. Did you keep this picture throughout the years?

3 A. Yes.

4 Q. Now, Shawn, was there occasions when you remember  
5 talking to your daughter with respect to her first day of  
6 first grade?

7 A. Oh, God. She was scared to death first grade. When she  
8 went from kindergarten, the picture that you all saw, she  
9 was excited, she knew all the kinds in the school because  
10 she was there for a couple years, but going to the first  
11 grade, she was nervous so she wanted me to come to school  
12 with her for the first grade. I couldn't promise her. She  
13 kept asking me to promise her that I'd be able to take her  
14 to school for that first grade, so all that summer long I  
15 was trying to prepare how to come up with a way to help her  
16 understand that I couldn't go with her for the first day of  
17 school.

18 Q. Do you remember speaking to her the day before the first  
19 day of school?

20 A. Yes.

21 Q. And can you tell the jury about that conversation?

22 A. She wanted me to go to school with her. She was asking  
23 me when I was coming home.

24 Q. And did you explain to her that you couldn't walk her to  
25 school?

1 A. Yes.

2 Q. And how did you share in her experience of the first day  
3 of first grade? Did you get a phone call?

4 A. Yes. I called, and she explained to me what she went  
5 through in her day, and she talked about her friends, her  
6 new friends she met.

7 Q. All right. And when you hung up from that phone call,  
8 what did you do, Shawn?

9 A. I cried.

10 Q. Why did you cry?

11 A. Because I couldn't be there.

12 Q. Now, Shawn, you had mentioned the first day of school.  
13 Were you able to be there for Kyara's graduation from  
14 grammar school?

15 A. No.

16 Q. Were you able to be there for Kyara's first day of  
17 Brownies?

18 A. No.

19 Q. Were you able to be there for any of the school  
20 presentations that Kyara had from the first grade to the  
21 eleventh grade?

22 A. No, I wasn't able to.

23 Q. And were you able to spend any birthdays with Kyara from  
24 the time that you were convicted on October 13th of 1989  
25 until you were released in November of 2003?

1 A. No.

2 Q. Were you able to spend any wedding anniversaries with  
3 your wife from the date that you were convicted on  
4 October 13th of 1989 through November of 2003?

5 A. No.

6 Q. How did you find out that Kyara had -- well, did you  
7 talk to Kyara about her first date?

8 A. Yes.

9 Q. Were you able to be there when she went on her first  
10 date?

11 A. No.

12 Q. Did you have a conversation with her about that?

13 A. Yes.

14 Q. And what did you do after that conversation?

15 A. I was trying to coach her into, you know, to make the  
16 right choices and stuff like that and be open because with  
17 females either they run after the boys and they stay away  
18 from home or you keep them home so I was trying to explain  
19 to her to bring him home if you have a boyfriend and you  
20 meet him and you like him, bring him home so your mother can  
21 meet him.

22 Q. Were you able to during the 5,182 days that you spent in  
23 jail in this case, were you able to attend any  
24 teacher-parent conferences?

25 A. No.

1 Q. Were you able to talk to any of Kyara's teachers during  
2 that time period?

3 A. No.

4 Q. Now, Shawn, at some point, well, at any point in time  
5 from the period of October 13th of 1989 till you were  
6 released in November of 2003, were you allowed to go home at  
7 all?

8 A. No.

9 Q. There were no furloughs?

10 A. No, no furloughs.

11 Q. Were you able to have any conjugal visits with your  
12 wife?

13 A. No.

14 Q. Now, Shawn, at some point you were aware that there were  
15 motions, post conviction motions filed on your behalf,  
16 right?

17 A. Yes.

18 Q. And what was your mind set during the time period that  
19 those motions were pending?

20 A. I was hopeful. I believed in the system.

21 Q. And did you learn at some point that a motion for new  
22 trial had been denied?

23 A. Yes.

24 Q. And who did you learn that from?

25 A. From you.

1 Q. How did you learn that, explain that to the jury, not  
2 the conversation, just explain how you learned it.

3 A. Okay. That the post conviction, when --

4 Q. The motion for new trial.

5 A. You came up on a visit.

6 Q. Okay. And did you learn during that visit that the  
7 motion had been denied?

8 A. Yes.

9 Q. Okay. And what was your state of mind at that point?

10 A. My state of mind was I was let down, I was sad.

11 Q. And then at some point did you learn that a direct  
12 appeal had been filed on your behalf?

13 A. Yes.

14 Q. What was your state of mind when the direct appeal was  
15 filed?

16 A. When it was filed, I was excited, I was more hopeful, I  
17 said this is the highest court of Mass., they have to hear  
18 me, you know, and I was really hopeful in this court that  
19 they was going to be able to exercise justice in this  
20 case.

21 Q. And at some point in time did you learn that your direct  
22 appeal had been denied?

23 A. Yes.

24 Q. And do you remember how you learned that?

25 A. I learned that from you, too.

1 Q. How did you learn it specifically?

2 A. It was over the phone.

3 Q. And do you remember a visit shortly thereafter?

4 A. Yes.

5 Q. All right. And do you remember at that visit any  
6 discussion about how you would tell your family?

7 A. I asked you because I couldn't do it.

8 Q. Say that again, I'm sorry.

9 A. I asked you to do it because I couldn't do it.

10 Q. To tell your family that your appeal had been denied?

11 A. Yes.

12 Q. Did something happen to you after your direct appeal was  
13 denied?

14 A. Yes.

15 Q. What happened?

16 A. I started losing hope.

17 Q. You started what, Shawn?

18 A. I started losing hope in the system.

19 Q. Okay. And what happened specifically?

20 A. I was trying to let my wife know to live her life.

21 Q. You were trying to let your wife know to live her  
22 life?

23 A. Uh-hum.

24 Q. What does that mean?

25 A. Because I was tired of hurting her.

1 Q. So what did you do, Shawn?

2 A. I tried to see other people to try to get her to stop  
3 coming to see me.

4 Q. Did you actually file for divorce?

5 A. Yes.

6 Q. Why?

7 A. Because I was tired of hurting her.

8 Q. And at some point in time did you withdraw the divorce  
9 petition?

10 A. Yes.

11 Q. And is that after having conversations with Rochelle?

12 A. Yes.

13 Q. She wasn't going to leave you?

14 A. She said she wasn't going to leave me. She says she  
15 wasn't going nowhere.

16 Q. Now, Shawn, at some point you're aware that there was a  
17 third motion for a new trial filed?

18 A. Yes.

19 Q. Okay. You were present for that hearing?

20 A. Yes.

21 Q. And at some point in time did you find out that there  
22 was a decision on that motion for new trial?

23 A. Yes.

24 Q. Can you tell the jury how you found that out.

25 A. I found out through you.

1 Q. Tell the jury exactly what happened.

2 A. I was in my cell --

3 Q. Wait, first when is this?

4 A. This is -- this was like on a Monday night or something  
5 like that in the evening like 9:30 at night.

6 Q. In November?

7 A. In November.

8 Q. Of 2003?

9 A. Yes.

10 Q. After you had served how many years, Shawn?

11 A. I served 15 years and some months.

12 Q. Okay. And what happened in this conversation?

13 A. A case worker had came and told me that I had a phone  
14 call.

15 Q. What time of night was it, Shawn?

16 A. It was like 9:30 at night.

17 Q. And was that unusual for you to have a phone call at  
18 9:30 at night?

19 A. Yes.

20 Q. Had it ever happened in the 5,182 days that you had been  
21 incarcerated?

22 A. No.

23 Q. When you got to the case worker's office, what  
24 happened?

25 A. I didn't know what it was. In my mind I thought

1 something happened to someone in my family, so I was rushing  
2 to the phone, and when I got to the phone, it was you on the  
3 phone.

4 Q. And what did you learn as a result of having that  
5 conversation with you?

6 A. That you told me that you were outside the prison and  
7 you had good news and bad news.

8 Q. And what was your response?

9 A. And I wanted to know the bad news.

10 Q. All right. And why outside the prison and not inside  
11 the prison?

12 A. Because the visiting room was closed. There were no  
13 visits.

14 Q. Okay. And you wanted to know the bad news?

15 A. Yes.

16 Q. And what was the bad news, Shawn?

17 MR. ROACHE: Objection, your Honor.

18 THE COURT: Just for the fact of having known and  
19 its impact on him. Go on.

20 Q. What was the bad news, Shawn?

21 A. The bad news was that it wasn't going to be today.

22 Q. And what was the good news?

23 A. The good news that I was coming home.

24 Q. And how did you feel, Shawn, after 5,182 days when you  
25 finally got the news at 9:30 at night on the telephone alone

1 at MCI-Gardner, how did you feel?

2 A. I was breathless, my legs were gone, I was excited.

3 Q. All right. And what did you do at that point?

4 A. At that point I asked you to let me -- this time I knew  
5 I could tell them, that I said don't tell nobody and I'll  
6 call them tomorrow.

7 Q. You wanted to tell your family yourself?

8 A. Yes.

9 Q. Were you able to sleep that night?

10 A. No.

11 Q. And what's the first thing you did the next morning?

12 A. I called my family.

13 Q. Okay. Can you explain what happened during those calls?  
14 Who did you speak to first?

15 A. I spoke to my wife.

16 Q. Did you wait in that line, that line of 45 people to  
17 call?

18 A. Yes.

19 Q. How long did you wait in that line before you could  
20 call?

21 A. I waited 30 minutes.

22 Q. And you spoke to your wife first?

23 A. Yes.

24 Q. And what did you tell her?

25 A. I told her that I'm coming home.

1 Q. And what was her reaction?

2 A. She dropped the phone.

3 Q. And then at some point did you speak to your daughter  
4 Kyara?

5 A. Yes.

6 Q. And what did you tell Kyara?

7 A. I told her her dream came true.

8 Q. What did you mean her dream came true?

9 A. Because she always said it was her dream that I come  
10 home.

11 Q. And you told her her dream came true?

12 A. Yes.

13 Q. And from that date that you spoke to your family on the  
14 phone in November of 2003, how long was it, Shawn, before  
15 you were brought to court?

16 A. A few days. I got a call from you later on that  
17 afternoon that I wasn't going in the next day, you told me  
18 Thursday.

19 Q. Okay. So you waited from Monday to Thursday?

20 A. Yes.

21 Q. And what happened physically when you got to the  
22 courthouse on Thursday?

23 A. We went down, and when I first got there, I was excited,  
24 I didn't know what to do, my mind was everywhere, I had to  
25 go to bathroom, everything, my whole body was changing, I

1 was so excited.

2 Q. So after we got to the courtroom, did you learn that you  
3 were going home that day?

4 A. Yes.

5 Q. And did you learn that the Commonwealth was not going to  
6 retry you again?

7 A. Yes.

8 Q. Tell the jury what happened.

9 A. When that happened, we sat in front of the Judge, and  
10 they read out the reasons why that this motion was going to  
11 be --

12 Q. Not what the Judge said, just what you were feeling at  
13 that time, Shawn.

14 A. What I was feeling is overwhelmed, I was excited. I  
15 just couldn't wait. It was like time wasn't moving quick  
16 enough for me to get to my family, and I was like in  
17 shortness of breath, and I was trying not to breathe too  
18 fast and think too fast because I didn't want to have a  
19 heart attack, I was too excited.

20 Q. And at some point were you brought upstairs?

21 A. Yes.

22 Q. And were the handcuffs removed from you?

23 A. Yes.

24 Q. And were the shackles removed from you?

25 A. Yes.

1 Q. And did that cell door open?

2 A. Yes, it did.

3 Q. And who was standing there when the cell door opened?

4 A. You was.

5 Q. Where did we go from there?

6 A. We went down to the third floor.

7 Q. Who was waiting for you on the third floor?

8 A. My family, my daughter, my wife, everybody.

9 Q. What happened when you got off the elevator?

10 A. There was a bunch of lights and everything, just,  
11 everybody, family, friends. It was just amazing. I lost my  
12 legs. I just grabbed my daughter, and I just said take me.  
13 I didn't know where to go. She says, "Where are you going?"  
14 "Wherever you take me." "She was like my dream came true."

15 Q. Were you able to walk out of the courthouse that day a  
16 free man?

17 A. Yes.

18 MS. SCAPICCHIO: I have nothing further.

19 MR. CURRAN: Can I have a few minutes, your Honor?

20 MS. HARRIS: May we be seen, your Honor?

21 THE COURT: All right.

22 (THE FOLLOWING OCCURRED AT SIDEBAR:)

23 MS. HARRIS: Just in an abundance of caution, I'm  
24 putting on the objection not being able to inquire into the  
25 innocence, your point about the precedent, every legislative

1 law for compensation that has been enacted with which I'm  
2 aware requires a finding of exoneration or a finding of  
3 actual innocence in order to qualify for compensatory  
4 damages so I put that on the record and refer to  
5 Mr. Curran.

6 MR. CURRAN: Judge, the other issue is just the  
7 way this has been brought out in regards to his failure not  
8 to do anything. He had other pending cases, he had other  
9 things that were on his record that he was faced with then  
10 went away, so it creates this issue now that he came from a  
11 squeaky past and was prevented from doing all these things.  
12 I mean --

13 THE COURT: You can cross-examine him if you wish,  
14 if you choose to, you could cross-examine him on his  
15 convictions. You can cross-examine him on pending cases if  
16 you want to.

17 MS. HARRIS: Can we cross-examine on his  
18 assertions he made post media that he thought he was being  
19 arrested for another individual that he had shot?

20 MS. SCAPICCHIO: Judge, I have been very careful  
21 to keep the damages from any of his convictions through the  
22 date of his release, that's where we ended, the day of his  
23 release. Those are post conviction statements.

24 THE COURT: They're post conviction statements  
25 that refer to pretrial. You started the story at the date

1 of his conviction to the date of his release, so I'll  
2 exclude those statements. Is there anything else? Your  
3 Honor, to the extent that he says he was terrified when he  
4 went to prison, I think it would bring new evidence that he  
5 had served prison time prior to that.

6 THE COURT: Yes, you can.

7 MR. ROACHE: To the extent he went home we should  
8 be able to say that in fact he didn't go home, he stayed  
9 with someone else for a period of time.

10 THE COURT: After he was released?

11 MR. ROACHE: That's correct.

12 THE COURT: Yes, you can have that.

13 THE COURT: Okay.

14 MR. CURRAN: Judge, can we have five minutes to  
15 confer?

16 THE COURT: Let's do that.

17 ( THE SIDEBAR CONFERENCE WAS CONCLUDED.)

18 THE COURT: Ladies and gentlemen, we'll take a  
19 brief break, but I'm telling you that we anticipate that the  
20 evidence in this phase, and this will be the concluding  
21 phase for this jury, will be over by we anticipate no later  
22 than lunch so we'll take a break right now. All rise for  
23 the jury.

24 (Jurors exited the courtroom.)

25 THE COURT: Fifteen minutes, counsel.

1 MS. SCAPICCHIO: Thank you.

2 (A recess was taken.)

3 THE CLERK: All rise for the jury.

4 THE COURT: You can all be seated. Proceed.

5 Mr. Curran.

6 MR. CURRAN: Subject to the Court's rulings and  
7 our objections that were previously noted, we have no  
8 further questions of this witness and thank the Court for  
9 the time.

10 THE COURT: Mr. Roache.

11 MR. ROACHE: Nothing, your Honor.

12 THE COURT: Thank you, Mr. Drumgold. Anything  
13 further?

14 MS. SCAPICCHIO: Not from plaintiffs, your  
15 Honor.

16 THE COURT: Counsel?

17 MR. CURRAN: Yes, your Honor, we call  
18 Francis O'Meara.

19 FRANCIS O'MEARA, having been duly sworn by the  
20 Clerk, testified as follows:

21 DIRECT EXAMINATION

22 THE WITNESS: Good morning, your Honor.

23 THE COURT: Good morning.

24 BY MR. CURRAN:

25 Q. Good morning, sir. Could you please state your name and

1 introduce yourself to Judge Gertner and the ladies and  
2 gentlemen of the jury.

3 A. My name is Francis O'Meara, and that's spelled,  
4 F-r-a-n-c-i-s O-'-M-e-a-r-a.

5 Q. Mr. O'Meara, could you tell the Court and the jury what  
6 your educational background is?

7 A. Degree, M.B.A. degree from Boston University and juris  
8 degree from Suffolk University.

9 Q. Where did you go undergraduate?

10 A. University of Massachusetts.

11 Q. What year did you graduate from University of  
12 Massachusetts?

13 A. 1973.

14 Q. And did you continue your education at that time?

15 A. I did.

16 Q. Where did you go to school?

17 A. A two-year M.B.A. program at Boston University followed  
18 by three years of law school.

19 Q. And what years did you go to law school?

20 A. '75 to '78.

21 Q. And did you work while you were going to law school?

22 A. I did.

23 Q. Where did you work?

24 A. I worked two jobs actually, I continued to drive cab in  
25 the city, and I also got a job in the Suffolk County

1 District Attorney's Office in June of '75.

2 Q. Okay. What year did you graduate from law school?

3 A. May-June of '78.

4 Q. And did you work during that three-year period of time  
5 while you were in law school at the D.A.'s Office in  
6 Suffolk County?

7 A. I did.

8 Q. And when you graduated from law school, where did you  
9 start your legal career?

10 A. I graduated in June of '78, became a lawyer in December  
11 of '78 and started as an assistant district attorney on  
12 January 3rd of 1979.

13 Q. Could you describe what your experience was in the  
14 district attorney's office starting when you became  
15 appointed as assistant D.A.?

16 A. Having gone through the prior three years of the  
17 appellate division in the district court, also the district  
18 courts, during that three-year period in January of '79, I  
19 was appointed to superior court as an assistant district  
20 attorney, and I was assigned to we had at that time five  
21 major felony teams. Each one had a team leader and three or  
22 four lawyers, assistant D.A.s that worked on the team, and  
23 in January of 1979, I was assigned to Major Felony Team 5  
24 and remained there for four and a half years.

25 Q. Could you tell the jury what Major Felony Team 5 was and

1 what did it do?

2 A. The five major felony teams prosecuted in superior court  
3 after cases would be indicted by a grand jury, it was their  
4 responsibility approximately 25 lawyers to prosecute all  
5 violent crimes. We categorized them into rapes, robberies,  
6 stabbings and shootings, anything of that serious nature we  
7 prosecuted, and everything less, the victim died, and if the  
8 victim died, it would be a homicide case, and the case would  
9 not be prosecuted by the major felony teams, it would go  
10 directly to the homicide division.

11 Q. You indicated you were on Team 5. What part of  
12 Suffolk County did Team 5 cover?

13 A. Well, there was a time when Team 5 covered the Roxbury  
14 District Court.

15 Q. Okay. And for how long were you an assistant D.A.  
16 handling major felonies for Team 5 in Superior Court?

17 A. A little over four and a half years from January of '79  
18 to September, '83.

19 Q. And what types of cases did you handle as assistant D.A.  
20 during that time period?

21 A. We tried, I tried many armed robberies, shootings,  
22 stabbings and many, many rapes.

23 Q. And at some point in time were you moved from Team 5 to  
24 another unit in the D.A.'s Office?

25 A. Yes, in September of 1983 I was assigned by D.A.

1 Flanagan to move from the felony teams to the homicide  
2 team.

3 Q. Okay. In what capacity?

4 A. As we call it, homicide prosecutor. From that point  
5 forward, I would be one of five lawyers in the homicide team  
6 which comprised of a team leader and four other assistant  
7 D.A.s, and we would investigate all sudden deaths, suicides,  
8 shootings, hangings, everything that happened that was of a  
9 violent nature, and if the victim died, we would work with  
10 the police to locate, identify people responsible for  
11 killing the person and then prosecuting them.

12 Q. Okay. At some point in time were you promoted?

13 A. I was.

14 Q. And what year?

15 A. In February of 1988, I became the team leader of the  
16 homicide team.

17 Q. Okay. Just going back a little, you indicated you spent  
18 some time in the appellate division?

19 A. Yes.

20 Q. What were your duties and responsibilities when you were  
21 assigned to the appellate division?

22 A. As a law student, you'd be given transcripts of trials  
23 that had previously occurred where there had been  
24 convictions and where the case was on appeal, the conviction  
25 was being appealed, and you would read the transcript and

1 research all of the legal arguments being put forward by the  
2 defendants' attorneys and respond to them by writing what's  
3 called a brief, disagreeing with their positions that the  
4 trial was not a fair trial and try to support the conviction  
5 before the appellate courts.

6 Q. Did you receive training during the course of your time  
7 in the district attorney's office up until you became the  
8 head of homicide?

9 A. Yes.

10 Q. What types of training did you receive?

11 A. Well, for the four and a half years that I was on  
12 Team 5, my team leader was Philip Beauchesne, and he was  
13 very active, a good boss, and he was always available night  
14 and day, and he would sit with us, the other lawyers on the  
15 team and counsel us on cases coming up and problems and  
16 evidentiary issues and whatnot.

17 Q. Would you go to seminars?

18 A. Yes.

19 Q. What type of seminars would you go to?

20 A. It would be teachings about at that time major felonies,  
21 about the identification process, how the police worked,  
22 what evidence is necessary to secure search warrants, how to  
23 draft search warrants in crimes involving allegations of  
24 rape, I deal with those and particularly evidentiary issues  
25 that are in those trials that are not in run-of-the-mill

1 rape, robbery, shooting case. So there was training every  
2 day throughout to learn how to beside prosecute these  
3 cases.

4 Q. Okay. Would you receive training in regards to  
5 exculpatory evidence during the course of your career?

6 A. Yes.

7 Q. What type of training did you receive?

8 A. Well, we'd be instructed that if there was evidence  
9 produced that you felt would be favorable to a defendant,  
10 you had an ethical obligation to turn that information over  
11 to his or her attorney.

12 Q. Okay. And you indicated in 1988 you became the head of  
13 homicide?

14 A. Yes, sir.

15 Q. And what were your duties and responsibilities at that  
16 time?

17 A. Well, under Massachusetts General Law, Chapter 28,  
18 Section 6 was passed by the legislature years ago, and it  
19 gives the district attorneys of each of the counties, you're  
20 overseeing all homicide investigations. At that time I was  
21 under Assistant District Attorney Flanagan was then in  
22 charge of investigating all the homicides that occurred in  
23 Suffolk County which includes, Boston, Revere, Chelsea and  
24 Winthrop. He then in turn delegated his authority to the  
25 chief of homicide who then was me to perform all the duties

1 that were given to him. He still remained in a supervisory  
2 capacity, but basically I was to run the day-to-day  
3 investigation and prosecution of all homicides.

4 Q. And could you explain to the jury the process when there  
5 was a shooting or stabbing or motor vehicle accident what  
6 would take place in regards to the homicide division?

7 MS. SCAPICCHIO: Objection, your Honor. This is  
8 damages.

9 THE COURT: I understand.

10 MR. CURRAN: Judge, we're getting there.

11 THE COURT: Okay. On the strength of, "we're  
12 getting there," I'll let you have it.

13 Q. You can answer, Mr. O'Meara.

14 A. We had district attorneys assigned on the 10-day,  
15 10-week rotational basis 10 people, assistant district  
16 attorneys who would be assigned to go out and assist the  
17 police in any way on all investigations, and as I said,  
18 suicides, sudden deaths, anything that was unexplained,  
19 violent deaths, deaths that weren't attended by a doctor,  
20 and at least one assistant district attorney would go out on  
21 each of these events and file a report and send it back to  
22 me and call me from the scene to explain me what do you  
23 have, what's there, what's it look like and address any  
24 legal issues that the police might have as to how to  
25 proceed.

1 Q. When a case was designated as a homicide, what would you  
2 do in your capacity as the head of homicide in  
3 Suffolk County in 1988 and 1989?

4 A. Well, when a case was a homicide and continued to be  
5 investigated by the police, they, at some point, the  
6 homicide unit of the Boston Police Department, when they  
7 thought they had sufficient evidence to seek an arrest  
8 warrant, they would contact me, that was the protocol that  
9 was set up by the district attorney, and they would speak  
10 with me whenever it was, 24 hours a day, 7 days a week and  
11 review with me the amount of evidence they collected and  
12 request that they could seek in the appropriate district  
13 court a warrant for the individual's arrest or  
14 individuals.

15 They would do that, they had to do that on every  
16 case, and I would spend time reviewing the evidence that  
17 they had collected and then make a decision whether or not I  
18 felt that they had sufficient evidence to go before a clerk  
19 at one of the district courts and seek an arrest warrant,  
20 and then if I made a decision that there was enough  
21 evidence, I'd instruct them --

22 MS. SCAPICCHIO: Objection.

23 THE COURT: Sustained.

24 MS. SCAPICCHIO: Motion to strike.

25 THE COURT: Sustained, it may be struck.

1 Q. Mr. O'Meara, at some point in time as the head of  
2 homicide, would you assign homicides that came into the  
3 Suffolk County District Attorney's Office?

4 A. During that period of time I assigned all homicides that  
5 came in.

6 Q. Okay. So every homicide that came into Suffolk County  
7 you were responsible for reviewing and then assigning to an  
8 assistant?

9 A. Once an arrest was made, yes.

10 Q. Okay. And do you know Phil Beauchesne?

11 A. Yes.

12 Q. And how long had you worked with Phil Beauchesne?

13 A. I worked for him almost five years, a little over four  
14 and a half years.

15 Q. How long did you work with him in the overall course of  
16 your career?

17 A. Almost 17 years.

18 Q. Okay. In 1989, what was the level of Phil Beauchesne's  
19 experience?

20 A. He was one of the most experienced homicide prosecutors,  
21 if not the most that was authorized to try homicide cases.

22 Q. Did you have a good relationship with him?

23 A. Very good.

24 Q. Were you able to communicate well with him?

25 A. Yes.

1 Q. Do you know Paul Connolly?

2 A. Yes, I do.

3 Q. How do you know Paul Connolly?

4 A. He was an assistant D.A. in superior court with me, he  
5 went to homicide, then I went to homicide, and we spent time  
6 together on the homicide team, then he was promoted to a  
7 team leader position.

8 Q. In 1988 and 1989, what was the level of experience of  
9 Paul Connolly?

10 A. It was close to Phil's. He had been a prosecutor for  
11 almost as long as Phil had been, make a couple, three years  
12 less.

13 Q. Based on your working with Phil Beauchesne and  
14 Paul Connolly during those 17 years, did they understand the  
15 obligations in regards to discovery --

16 MS. SCAPICCHIO: Objection.

17 Q. -- as it pertained --

18 THE COURT: Sustained. No, no, the objection is  
19 sustained. Go on.

20 Q. Did you have a time in August of 1988 to assign  
21 Phil Beauchesne to an investigation into the murder of  
22 Tiffany Moore?

23 A. Yes.

24 Q. When did that occur?

25 A. Either on August 29th, when Mr. Drumgold was arraigned,

1 or possibly as late as the next day, August 30th.

2 Q. Okay. And did you partake in the review that you just  
3 spoke to the jury about in regards the police's evidence --

4 MS. SCAPICCHIO: Objection.

5 THE COURT: Sustained.

6 Q. -- to assign it for probable cause?

7 THE COURT: Objection is sustained.

8 MS. SCAPICCHIO: Move to strike.

9 Q. Now, Mr. O'Meara, after you assigned the case of  
10 Commonwealth vs. Shawn Drumgold and Terrance Taylor to  
11 Phil Beauchesne, did you play any further role up until the  
12 conviction?

13 A. No.

14 Q. Okay. Why not?

15 A. The five team leaders of the felony teams were all  
16 located in a building not where I was located, I was in the  
17 courthouse, my team, my four and myself, when these  
18 homicides were assigned, if I assigned them to the team,  
19 that was fine, if I assigned it to one of the team leaders  
20 across, down the street, each of those five people were  
21 senior to me in experience, so the case would go to them,  
22 and they being senior trial lawyers, would try the case.

23 The only time I would get involved is at the end  
24 of the case when the case was settled, they would return the  
25 case to the division as a settled case, and I would

1 immediately assign them another one.

2 Q. Okay. And do you recall assigning the case of  
3 Commonwealth vs. Treas Carter to Paul Connolly?

4 A. Yes, I do and I did.

5 Q. Okay. Did you have any role up until the plea relative  
6 to the prosecution of Treas Carter for the murder of  
7 Willie Evans?

8 A. No, I did not.

9 Q. In Suffolk County, in the Suffolk County District  
10 Attorney's Office, could you explain what the role of the  
11 assistant district attorneys are relative to the discovery  
12 process?

13 MS. SCAPICCHIO: Objection.

14 THE COURT: Sustained. You can ask what  
15 procedures, if any, were in place after the conviction of  
16 Shawn Drumgold in, what was it, September of 1989?

17 MR. REILLY: October.

18 THE COURT: October of 1989.

19 Q. What procedures were in place in the Suffolk County  
20 District Attorney's Office relative to their ongoing  
21 discovery obligations post October 13th, 1989?

22 A. I apologize, are you referring specifically to this case  
23 or all cases in general?

24 Q. All cases in general.

25 A. Each assistant being assigned to a case would continue

1 to review the evidence as it came in and some could come in  
2 while the case is pending, and as I said previously, if  
3 something came forward that caused you to think that this is  
4 called exculpatory, to take your attention away from --

5 MS. SCAPICCHIO: Objection.

6 THE COURT: Your objection is? Are these  
7 policies? What's your objection?

8 MS. SCAPICCHIO: It's not responsive to the  
9 question, and he's asked about policies, and now he's  
10 explaining something that isn't policy.

11 MR. CURRAN: It is responsive to the question,  
12 Judge, and it is policy what he just said.

13 THE COURT: I'm going to allow it.

14 MS. SCAPICCHIO: Not that they revealed to me  
15 before today. If there's a policy in existence, I'd like to  
16 see it.

17 THE COURT: Well, you'll be able to examine  
18 whether it is written, oral or just mentioned today for the  
19 first time. Go on, sir.

20 THE WITNESS: May I continue?

21 THE COURT: Yes.

22 THE WITNESS: Thank you.

23 A. Each assistant D.A. would examine the case, as I said,  
24 the evidence that they had, and if there was any evidence  
25 that tended to be exculpatory, which is exculp from the

1 Latin, lame, away from lame, it tended to be something that  
2 would help the defendant or negate maybe his other evidence  
3 against him, and you were obligated ethically to turn this  
4 evidence over to the defense, and that was done on a regular  
5 basis.

6 Q. Was there a policy that permitted police officers to  
7 turn that evidence directly over to the defense without  
8 going to the D.A.'s Office?

9 MS. SCAPICCHIO: Objection, Judge. This is  
10 damages.

11 MR. CURRAN: Judge, it goes to the question --

12 THE COURT: No, the only question, ladies and  
13 gentlemen, this is the damages phase of the case, and there  
14 is a defense which the defendants will seek to raise in this  
15 testimony as to whether there was what is known as a  
16 superseding cause, in other words, whether the damages in  
17 this case flowed not from the actions of Officer Callahan  
18 but from something that the district attorney's office did  
19 or didn't do after the conviction of Mr. Drumgold, and I'll  
20 instruct you more specifically about that.

21 This testimony is solely going to that, so it  
22 seems to me the questions should focus on the post  
23 conviction period, and if there's a question of policies,  
24 you'll have an opportunity to cross-examine as to whether  
25 these are written, oral or ever mentioned before.

1 MS. SCAPICCHIO: Thank you, your Honor.

2 THE COURT: Go on.

3 Q. Post October 13th, 1989, was there a policy in the  
4 Suffolk County District Attorney's Office which permitted a  
5 police officer to bypass the D.A.'s Office and go directly  
6 to defense attorneys to disclose what may be considered  
7 exculpatory evidence?

8 MS. SCAPICCHIO: Objection.

9 THE COURT: You can have it.

10 A. No. The police had to go through us, everything came to  
11 us for our evaluation, us, meaning the assistant D.A., and  
12 then we distributed all the discovery, the inculpatory  
13 evidence and if there is any exculpatory evidence.

14 Q. And it was the assistant D.A.'s responsibility to make  
15 that evaluation and decision?

16 A. That's correct.

17 MS. SCAPICCHIO: Objection.

18 THE COURT: Wait. You're objecting?

19 MS. SCAPICCHIO: He's leading his witness.

20 THE COURT: Sustained.

21 Q. Okay. Whose decision was it, whose responsibility was  
22 it post October 13th, 1989 to evaluate and assess any  
23 information or evidence to whether it was exculpatory?

24 MS. SCAPICCHIO: Objection.

25 THE COURT: Overruled.

1 A. The assistant district attorney assigned to the case.

2 Q. In your role as the head of homicide, did you ever have  
3 the opportunity to discuss expenses related to homicide  
4 prosecutions, expenses between the D.A.'s Office and the  
5 Boston Police Department?

6 THE COURT: During the period of late, 1989, early  
7 1990?

8 MR. CURRAN: Yes.

9 A. Yes.

10 Q. Okay. Post October 13th, 1989, or at that time, at  
11 October 13th, 1989, was there a policy in the D.A.'s Office  
12 in regards to when the D.A.s were responsible for costs  
13 associated with expenses at a murder prosecution?

14 MS. SCAPICCHIO: Objection.

15 THE COURT: The question was there a policy. Go  
16 on.

17 A. Yes, there was.

18 Q. What was the policy?

19 A. The policy, which was set by me, there's a date called  
20 the indictment date, and that's the date, it's not the date  
21 of the arrest, it's the date later in the case when the  
22 grand jury returns an indictment for a homicide in general.  
23 That became the magic date, so to speak, between the Boston  
24 Police Department and the Suffolk County D.A.'s Office.  
25 Expenses that were incurred pre-indictment date were the

1 Boston Police Department's responsibility, and expenses that  
2 occurred post indictment date were the Suffolk County  
3 District Attorney's responsibility.

4 Q. Did you ever have the responsibility to speak -- strike  
5 that. Did you ever hear about a witness named Ricky Evans  
6 that was a witness in the Commonwealth vs. Shawn Drumgold  
7 case?

8 A. I did.

9 Q. Okay. Do you have a memory today when you first heard  
10 about Ricky Evans?

11 A. Yes.

12 Q. When did you first hear about Ricky Evans?

13 A. It was post verdict in the Drumgold case and possibly  
14 post the plea I think it was on December 20th in the  
15 Treas Carter case. It was after Drumgold's verdict, which  
16 would have been then December, or it could have been as late  
17 as January after the other case that was pled by  
18 Paul Connolly.

19 Q. Okay. How did you come to find out about this witness,  
20 Ricky Evans?

21 A. I received a telephone call which occurred from time to  
22 time from Deputy Joseph Dunford in the Boston Police  
23 Department, and he and I would review expenses. Basically  
24 the first question he'd ask me is what's the indictment date  
25 on this case, Frannie, and I'd give it to him, and from that

1 he'd determine which bills he was supposed to pay and which  
2 bills he was supposed to forward to the organizer of the  
3 D.A.'s Office and the indictment was the cutoff date,  
4 pre-indictment Joe Dunford had to write a check from the  
5 Boston Police Department, post indictment came to us.

6 Q. Did you have these meetings periodically with  
7 Deputy Dunford --

8 A. I did.

9 Q. -- relative to expenses related to homicide cases?

10 A. He would call me on a fairly regular basis reviewing  
11 specifically the indictment dates and whatnot to try to  
12 determine whose expense it was.

13 Q. Were there times that you were advised of an expense  
14 that you were unaware of as the head of homicide?

15 MS. SCAPICCHIO: Objection.

16 A. Yes.

17 Q. What would you do in your custom practice and procedure  
18 when you were asked about an expense that you were unaware  
19 of as the head of homicide?

20 MS. SCAPICCHIO: Objection.

21 THE COURT: The question is whether this is one  
22 that he had been unaware of.

23 MR. CURRAN: I'm setting the foundation, Judge,  
24 just in general what his practice was and then we're going  
25 to get to this expense.

1                   THE COURT: What his practice was in?

2                   MR. CURRAN: In October of 1989.

3                   THE COURT: First, did he have a practice with  
4 respect to expenses, what it was, then the time. Go on.

5                   Q. Did you have a practice relative to expenses after  
6 having conversations with Deputy Dunford?

7                   A. I did.

8                   Q. What was your practice?

9                   A. If the expense was his, it was his; if the expense was  
10 ours, I would notify the first assistant D.A. that there's  
11 an expense coming in that we have to pay, I'd confirm for  
12 him that it was an appropriate expense and it had to be  
13 paid.

14                  Q. When you say first you'd confirm whether it was an  
15 appropriate expense and it had to be paid, how did you  
16 confirm it?

17                  A. Well, if it was one of the members of my team, I  
18 probably would have reviewed it with him or made him know  
19 about it.

20                  MS. SCAPICCHIO: Objection, your Honor, probably  
21 would have.

22                  THE COURT: Sustained.

23                  MS. SCAPICCHIO: Move to strike.

24                  THE COURT: Sustained.

25                  Q. If it was your team that you had direct supervision

1 over, what would you have done?

2 A. I would have already known about the expense and made  
3 certain it was approved.

4 Q. And if it was one of the cases that was assigned to one  
5 of the team leaders that you did not have direct supervision  
6 over, what would you do?

7 A. If it was an expense that I was unaware of at that time,  
8 I would confirm with the particular team leaders whose  
9 homicide case it was that this was an expense, it happened  
10 in the case and it was a legitimate expense that we owed,  
11 and I would transfer that information to the first  
12 assistant.

13 Q. Why would you transfer it to the first assistant?

14 A. Because he was the person who approved expenses and sent  
15 them to the organizers of the office who then wrote checks,  
16 paid for expenses.

17 Q. Okay. Would you call the first assistant first before  
18 the trial prosecutor?

19 A. No.

20 Q. Why?

21 A. Because the first question he would ask me is did you  
22 check with the assistant and find out if this is an  
23 appropriate expense, so I would check with the first  
24 assistant first to see that it was an appropriate expense,  
25 then I would call and say I've spoken with the first

1       assistant on the case, Mr. Beauchesne or Mr. Connolly,  
2       whoever it might be, and this is an expense that we  
3       incurred, I wasn't aware of it, but I'm aware of it now, and  
4       it's post indictment date, and you'll be getting a call from  
5       Joe Dunford about this and giving a heads-up that it's  
6       coming in and this is what it's about, it's an expense that  
7       although I didn't know about it when it was happening, I now  
8       know about it and it's coming, and you should be aware it's  
9       coming and the background of it.

10      Q. In regards to the case of Commonwealth vs.  
11       Shawn Drumgold, did you have a conversation with  
12       Deputy Dunford regarding expenses related to a Ricky Evans  
13       being relocated to the Howard Johnson's hotel?

14      A. I did.

15      Q. Okay. And could you tell me when that occurred the best  
16       of your memory.

17      A. It definitely occurred post verdict in the Drumgold  
18       case, and it may have gone as long as post plea in the  
19       Carter case, some time December or January. I can't tie it  
20       down any more than that, it was after one of those events  
21       and possibly after both of those events Joe Dunford called  
22       me, and we've got an expense here for the Howard Johnson's  
23       hotel for a witness, I think this is post indictment, what's  
24       the indictment date, and it certainly was.

25      Q. And at that time you were aware that it was related to

1 the Commonwealth vs. Shawn Drumgold case?

2 MS. SCAPICCHIO: Objection.

3 A. Yes.

4 THE COURT: Wait, wait, wait, there's an objection  
5 that he's leading. That's sustained. Next.

6 Q. Okay. Did you investigate what case Ricky Evans was  
7 involved with in his relocation to the hotel?

8 A. Yes.

9 Q. Okay. And what information did you find out?

10 A. It was the Shawn Drumgold case.

11 Q. Okay. Were you also aware at that time whether or not  
12 he was a witness in any other cases?

13 A. I'm not sure whether I knew that then or later. I don't  
14 remember.

15 Q. All right. At some point in time were you made aware he  
16 was a witness in the Treas Carter case which was a plea in  
17 December of 1989?

18 A. I knew that Treas Carter had pled on December 20th of  
19 1989. I don't know exactly when I learned that Mr. Evans  
20 was a witness in that case, too.

21 Q. Okay. As a result of that conversation with  
22 Deputy Dunford, what did you do?

23 A. I confirmed with the assistant assigned to the case that  
24 it was a legitimate expense that we owed, and I called the  
25 first assistant and gave him that information.

1 Q. Okay. Who was the assistant that you confirmed that  
2 with?

3 A. Beauchesne.

4 Q. Okay. Was it a long conversation? Was it a brief  
5 conversation?

6 A. It was just very short. I've got this bill here from  
7 Joe Dunford in Drumgold, "Is this something we owe?" And he  
8 confirmed that, yes, we owe that, and that was it.

9 Q. Okay. Were you aware in regards to the length of the  
10 stay at the Howard Johnson's?

11 A. I'm not sure. I'm not sure if I knew the length, I  
12 think I tried to compute it by the time when I knew he was  
13 homeless up in the Elm Hill section and Sergeant Callahan  
14 took him for his own safety and brought him over. I knew  
15 that occurred after September 12th.

16 MS. SCAPICCHIO: Objection, your Honor.

17 THE COURT: Sustained.

18 MS. SCAPICCHIO: Move to strike.

19 THE COURT: Sustained. There's a question and an  
20 answer and nothing beyond the question.

21 MR. CURRAN: Can the defendants have a moment,  
22 your Honor?

23 THE COURT: Yes.

24 MR. CURRAN: May I approach the witness, your  
25 Honor?

1                   THE COURT: With what?

2                   MR. CURRAN: Motion for new trial testimony, page  
3 197 for the purposes of refreshing his recollection, your  
4 Honor.

5                   THE COURT: Wait a second. Please take that away.  
6 You haven't asked a question which suggested that his  
7 recollection was exhausted. Can you ask that question?

8                   MR. CURRAN: Sure.

9 Q. You indicated September 12th, 1989, was a particular  
10 date. What were you referring to?

11                  MS. SCAPICCHIO: He did not.

12                  THE COURT: I don't recall that testimony either.  
13 Can you roll it back a little bit?

14                  MR. CURRAN: Sure.

15 Q. Do you recall the length of stay of Ricky Evans at the  
16 Howard Johnson's hotel?

17 A. I believe it to be in the vicinity of two weeks.

18 Q. Okay. What did you base that on?

19 A. I learned that on November 12th he was still living at  
20 his home because that was the date that -- well, he was  
21 spoken to by somebody. That was in a report that I  
22 reviewed, and I knew that the trial was coming up the end of  
23 the month, so it just looked like two weeks, maybe a  
24 little bit longer.

25 Q. Did you speak to anyone in regards to the length that

1 you remember?

2 A. When Joe Dunford called me with the bill and the  
3 question about indictment date, he had to have told me how  
4 many days it was, I just don't remember now.

5 Q. Okay. At some point in time, were you advised whether  
6 or not the D.A.'s Office paid for the bill?

7 A. As far as I know, it was paid for by the D.A.'s  
8 Office.

9 MR. CURRAN: I have no further questions. Thank  
10 you, Mr. O'Meara.

11 CROSS-EXAMINATION

12 BY MS. SCAPICCHIO:

13 Q. Mr. O'Meara, do you remember testifying in 2003?

14 A. Where? In reference to what, ma'am?

15 Q. In Suffolk Superior Court in reference to Mr. Drumgold's  
16 motion for a new trial?

17 A. 2003, the motion for new trial?

18 Q. Yes.

19 A. I do remember that.

20 Q. You remember testifying in that case, right?

21 A. Yes, I do.

22 Q. That's when Mr. Drumgold's liberty was at stake; do you  
23 remember that? He was serving life without the possibility  
24 of parole; do you remember that?

25 A. That's correct.

1 Q. And you were testifying in that case? Do you remember  
2 that?

3 A. I was called as a witness.

4 Q. Did you tell Judge Rouse back in 2003 that you asked  
5 Phil Beauchesne about this bill from the Howard Johnson's?  
6 Did you say that in 2003, sir?

7 A. I believe I did.

8 Q. You did. Sir, isn't it fair to say in 2003 when you  
9 were specifically asked questions about whether or not you  
10 had a conversation with Phil Beauchesne, you told that court  
11 in 2003 that you didn't? Do you remember that, sir?

12 A. No, I don't.

13 Q. Sir, do you remember being asked questions in 2003 when  
14 you were called before the Court to testify at the motion  
15 for a new trial, do you remember being asked questions  
16 specifically about your role as head of the homicide to try  
17 to determine whether or not anyone from the Suffolk County  
18 District Attorney's Office knew about these payments? Do  
19 you remember those questions, sir?

20 A. No, I don't.

21 Q. Sir, do you remember telling the Court back in 2003 that  
22 Howard Johnson's wasn't a place that you used in the  
23 district attorney's office? Do you remember that, sir?

24 A. That's correct, it wasn't.

25 Q. Do you remember telling that to the Court?

1 A. I did.

2 Q. Okay. And do you remember being asked after you told  
3 the Court that Howard Johnson's wasn't a place that you  
4 used, do you remember being asked specifically whether or  
5 not the district attorney's office got the bill? Do you  
6 remember being asked that?

7 A. I don't remember being asked that.

8 MS. SCAPICCHIO: This is page 216 of his 2003  
9 testimony.

10 Q. Can you read lines 11 through 15 to yourself, sir.

11 MS. SCAPICCHIO: May I approach the witness, your  
12 Honor?

13 THE COURT: Yes, you may.

14 Q. Does that refresh your memory, sir, as to whether or not  
15 in 2003 when you were asked whether or not you ever received  
16 a bill, you told the Court -- were you under oath in 2003?

17 A. Yes, ma'am.

18 Q. You took the same oath you took today?

19 A. That's correct.

20 Q. You understand the oath to tell the truth, the whole  
21 truth and nothing but the truth?

22 A. I do.

23 Q. And the truth doesn't change, does it, sir?

24 A. Memories fade, but the truth doesn't change, no.

25 Q. Well, back in 2003, your memory would be a lot better

1 than it is today in 2009; is that fair to say, sir?

2 A. It would be better.

3 Q. Okay. In 2003, when you were asked about the bill,  
4 didn't you say we never received the bill?

5 A. We didn't receive the bill.

6 Q. Okay. And that's what you told the Court back in  
7 2003?

8 A. That's correct.

9 Q. And you said the only reason you were involved in this  
10 case was because you got a bill, right?

11 A. Because Joe Dunford called me about a bill that the  
12 Boston Police received. The D.A.'s office was never billed  
13 directly for this, that's why I was saying the Boston Police  
14 was billed for it. He had to call me and notify me of it.  
15 We didn't have it. It didn't come to us.

16 Q. Now, sir, you just told us on direct examination that  
17 you had a memory of speaking to Phil Beauchesne after you  
18 had this conversation with Deputy Dunford, right?

19 A. I have a memory that I confirmed that the expense was  
20 legitimate, so to speak, or accurate.

21 Q. Page 218, do you remember telling Judge Rouse you had no  
22 such conversation, sir, that you don't remember speaking to  
23 anyone in the district attorney's office regarding this  
24 bill? Isn't that what you said under oath in 2003, sir?

25 A. Give me a chance to read it, I'll be happy to answer

1 your question. I said here that I confirmed it possibly  
2 with the trial assistant.

3 Q. No, no, no, sir, that's not what you said. When you  
4 were asked specifically whether or not you confirmed it, you  
5 told us today --

6 MR. CURRAN: Objection, your Honor.

7 Q. -- that you spoke to the trial prosecutor; isn't that  
8 what you said?

9 A. That's correct.

10 Q. In 2003, sir, when you were asked that specific  
11 question, do you have a memory of who you would have  
12 confirmed this with back then, do you know if you talked to  
13 Phil Beauchesne? Tell us what your answer was at line 15.

14 THE COURT: Wait, wait.

15 MR. CURRAN: She pulled the document. He was  
16 reading his answer which says what he was testifying to.  
17 She doesn't like the answer.

18 THE COURT: No, Mr. Curran, what I would like you  
19 to do is to read the question and read the answer and under  
20 801(d)(1) you can in fact put that on the screen and  
21 introduce it as an exhibit. That way the question and the  
22 answer will be known to the jury.

23 Q. Sir, you were under oath in 2003; is that fair to say?

24 A. That's correct.

25 Q. And you were testifying, you took the same oath that you

1 took here today; is that fair to say?

2 A. That's correct.

3 Q. At line 12, sir, is the question, "Do you have a memory  
4 of who you would have confirmed it with back then? Do you  
5 know if you talked to Phil Beauchesne?" What was your  
6 answer at line 15?

7 A. The answer there is, "I don't."

8 Q. Okay. So you were under oath in 2003, you were asked a  
9 specific question as to whether or not you would have talked  
10 to Phil Beauchesne, and your answer was you had no memory of  
11 it, right?

12 A. I answered the prior question is that I either spoke to  
13 Phil Beauchesne or Tim Callahan, and that's what I said back  
14 then, and that's my position today.

15 Q. That's not what you said today, today you said you spoke  
16 to Phil Beauchesne, not you might have spoke to him, not you  
17 think you spoke to him, you actually remember speaking to  
18 him, right?

19 A. I do.

20 Q. Okay. And in 2003, when you were asked that specific  
21 question, in 2003, when you were asked that specific  
22 question, sir, do you know if you talked to Phil Beauchesne,  
23 your answer was, "I don't," right?

24 A. I said I spoke to either Phil Beauchesne or Tim  
25 Callahan.

1 Q. But now it's Phil Beauchesne, right?

2 A. That's correct.

3 Q. After Tim Callahan was found responsible for  
4 Shawn Drumgold's conviction, now it's Phil Beauchesne,  
5 right?

6 MR. CURRAN: Objection.

7 THE COURT: Overruled.

8 Q. Right, sir?

9 A. Now it's Phil Beauchesne, yes.

10 Q. But it wasn't Phil Beauchesne in 2003, right?

11 A. In 2003, it was either Phil Beauchesne or  
12 Tim Callahan.

13 Q. No, no, sir, because you go on to say, "It's more  
14 likely," if you look at line 17, you go on to say, "It's  
15 more likely, it's more likely Lieutenant Callahan than  
16 Phil Beauchesne." Do you remember that saying under oath,  
17 sir?

18 A. I don't remember saying it, but I believe it's there.

19 Q. Well, you wouldn't have lied, would you have, sir?

20 A. No, I don't lie under oath, ma'am.

21 Q. Okay. So when you said back in 2003 that it was more  
22 likely you spoke to Lieutenant Callahan, that's not what you  
23 told us here today, right?

24 A. That's correct. Today --

25 Q. Today you say it's Phil Beauchesne?

1 A. Today I believe it was Phil Beauchesne, yes.

2 Q. Sir, what changed other than the fact that  
3 Lieutenant Callahan was found responsible for  
4 Shawn Drumgold's unfair trial, what else changed, sir?

5 A. At a prior proceeding in this building, I spoke to  
6 Tim Callahan. This is after the motion for new trial.

7 Q. So you spoke to Tim Callahan and your testimony changed;  
8 is that what happened, sir?

9 A. I spoke to him, and he informed me that if it was him or  
10 Phil Beauchesne, he doesn't remember me calling him on it,  
11 so then it must have been Phil Beauchesne.

12 Q. So it was your conversation with Tim Callahan?

13 A. Right.

14 Q. Who told you you didn't talk to me some time after you  
15 testified here?

16 A. Correct.

17 Q. That's what changed your testimony?

18 A. Now I believe it was Phil Beauchesne.

19 Q. Well, sir, weren't you deposed in this case, too?

20 A. I was.

21 Q. When you were deposed, didn't you say you had no memory  
22 of ever telling Phil Beauchesne?

23 A. I didn't say I had no memory of ever telling him. I  
24 would have confirmed this expense before I called the first  
25 assistant.

1 Q. You didn't, you said you didn't in 2003, sir, you said  
2 you didn't at your deposition, sir, and now you come in here  
3 after you spoke to Lieutenant Callahan, and you say you did;  
4 is that right?

5 MR. ROACHE: Objection. She's putting facts in  
6 the question that are not in evidence.

7 THE COURT: The objection is overruled. Go on.

8 Q. Sir, is that right, the thing that changed --

9 THE COURT: You have a compound question. The  
10 question was whether there was a prior statement in 2003;  
11 the question was whether or not there was a prior statement  
12 in a deposition. If you have a prior statement in the  
13 deposition, you can inquire about that, and then you can  
14 have the summary question at a high rate of voice.

15 MS. SCAPICCHIO: Your Honor, I move at this time  
16 to introduce this page of his 2003.

17 THE COURT: Yes, you can introduce that, you can  
18 excise the part, it will go to the jury with only the  
19 relevant parts. Go on.

20 ( Page 218, line 12 to line 18 of The Motion for  
21 New Trial was marked and admitted into evidence as Exhibit  
22 No. 15.)

23 Q. Now, sir, you remember being cross-examined by me in  
24 2003?

25 A. I know it happened. I don't remember it.

1 Q. I'm sorry.

2 A. I know it happened, but I don't remember it.

3 Q. Okay. Do you remember answering questions again under  
4 oath in 2003?

5 A. Yes, I remember that.

6 Q. Do you remember specifically being asked questions about  
7 whether or not you ever got involved with discussing  
8 witnesses with team leaders?

9 A. That's correct.

10 Q. And do you remember, sir, your answer back in 2003 when  
11 you were under oath is that, "If it was a team leader, to  
12 the extent they were doing something with a witness, that's  
13 something they would take upon themselves. I wouldn't be  
14 aware of it, nor would I need to be aware of it." Is that  
15 what you said in 2003 under oath, sir?

16 A. If I did, I did. That's still my testimony.

17 Q. Now, sir, do you also remember testifying in 2003 that  
18 if it was an expense at the district attorney's office that  
19 you actually paid, it would be authorized in advance; do you  
20 remember that, sir?

21 A. That's also true.

22 Q. And this wasn't an expense that was authorized in  
23 advance, sir, was it?

24 A. No, it was not. Not by me.

25 Q. Sir, do you remember being asked questions in 2003 --

1 A. Yes.

2 Q. -- regarding Mr. Evans and the district attorney  
3 office's conversations regarding payment of money? Do you  
4 remember those questions, sir?

5 A. No.

6 Q. Do you remember being cross-examined in 2003 and being  
7 asked specifically, sir, whether or not -- if I can just  
8 have a minute, your Honor. Sir, when you were asked in 2003  
9 under oath if there were any discussions about Ricky Evans'  
10 housing situation prior to the Drumgold trial, it was your  
11 position that there were no discussions prior to the  
12 Drumgold trial; is that right?

13 A. Not with me.

14 Q. Okay. And that you had no role in prosecuting the case  
15 against Shawn Drumgold; is that right?

16 A. Other than the arrest, after the arrest, I assigned it  
17 to Phil Beauchesne, and I had no involvement in the case  
18 from that point forward.

19 Q. Now, sir, when you talked about the bill under oath in  
20 2003 and you were asked whether or not you spoke at all to  
21 Phil Beauchesne, is it your testimony, sir, that when you  
22 told the Court back in 2003 that you didn't have a memory of  
23 speaking to Phil Beauchesne that that was a lie?

24 A. No, I had a memory of either speaking to Phil Beauchesne  
25 or Tim Callahan, that's what I said back in 2003. I would

1 have spoken to one, seen one or the other of them or talked  
2 to one or the other of them to confirm the expense, and I  
3 did.

4 Q. Not what you would have done, sir, what you testified to  
5 under oath. Under oath in 2003, you said that you had no  
6 memory of speaking to Phil Beauchesne, right?

7 A. In the text above that, it says I either spoke to him or  
8 Tim Callahan, but I had no memory of speaking to him on that  
9 day, but I had to get it confirmed, I had to speak to one of  
10 them to find out it was a legitimate expense, and I did.

11 Q. Well, sir, didn't you tell the Judge in 2003 you spoke  
12 to Sergeant Callahan?

13 A. I said it was more likely Timmy Callahan than  
14 Phil Beauchesne, but I always left open the possibility that  
15 it was Phil Beauchesne. I never spoke to Phil Beauchesne  
16 about it or Timmy Callahan at that time. I knew I had  
17 somebody I had to confirm it with.

18 Q. Did you ever tell David Meier, who was prosecuting the  
19 case for the Commonwealth back in 2003, that you think you  
20 talked to Bill Beauchesne about paying this bill; did you  
21 ever say that to David Meier?

22 A. I would have told him that I spoke to either  
23 Tim Callahan, who's the sergeant on the homicide team, or  
24 Phil Beauchesne, who's the assistant D.A., whoever I saw  
25 first. If I saw Timmy first or if I called Phil and caught

1 up with him first, I would have confirmed the expense.

2 Q. Sir, we're not talking about would have, could haves or  
3 should have --

4 A. That's what I did.

5 Q. -- we're talking about what you testified to under oath  
6 in 2003, in 2003 when you were asked whether or not you  
7 talked to Phil Beauchesne, you said no, right?

8 A. No, I didn't say no.

9 Q. You said, "Did you confirm it with Phil Beauchesne? Did  
10 you talk to Phil Beauchesne?" Do you remember that  
11 testimony, sir? What was your answer?

12 A. Do I have a memory of doing it, and I said at that time,  
13 I don't, I don't have a memory of doing that, but right  
14 above that, I said I spoke to either Lieutenant or the trial  
15 assistant.

16 Q. And then when you --

17 A. Four lines above the ones that you keep referencing.

18 Q. Read the ones right below, sir, when you were asked to  
19 explain your answer that you didn't speak to  
20 Phil Beauchesne. Read your answer.

21 MR. ROACHE: Your Honor, this is the third time  
22 we're going through this.

23 THE COURT: I understand. This is the last time.

24 A. It would be likely --

25 THE WITNESS: I'm sorry, are you finished, your

1 Honor?

2 THE COURT: Go on.

3 A. It would be more likely that I spoke to  
4 Lieutenant Callahan than Phil Beauchesne, but I spoke to one  
5 of them.

6 Q. Sir, the only thing that changed from your testimony  
7 under oath in 2003 is that you spoke to Detective Callahan,  
8 right?

9 A. I don't understand that question, ma'am.

10 Q. Sure. When you testified under oath and you said you  
11 didn't know if you talked to Phil Beauchesne, the only thing  
12 that changed from 2003 to now is you spoke to Tim Callahan,  
13 right?

14 A. That's correct.

15 Q. And you're friends with Hugh Curran, aren't you?

16 A. We worked together, yes.

17 Q. You worked together in the district attorney's office?

18 A. Yes, we did.

19 Q. And you're friends with his former boss, his partner,  
20 right?

21 MR. CURRAN: Objection, Judge, can we be seen?

22 THE COURT: Come at sidebar.

23 (THE FOLLOWING OCCURRED AT SIDEBAR:)

24 MR. CURRAN: Judge, that's a hit below the belt.  
25 We know it. We could have gotten to the fact that

1 Mr. Reilly's former partner Bill Walsh is also a friend of  
2 his. We got to the fact that Paul Connolly switched his  
3 testimony from the first trial to the second trial after he  
4 had contact.

5 THE COURT: Keep your voice down.

6 MR. CURRAN: These are --

7 THE COURT: Where are you going?

8 MS. SCAPICCHIO: I'm almost done.

9 MR. REILLY: We already have testimony about  
10 Jim McCall, a lawyer and he shares space with  
11 Ms. Scapicchio.

12 MR. CURRAN: He represented a witness in the  
13 case.

14 THE COURT: We're going to have one or two more  
15 questions, and then it's over.

16 MS. SCAPICCHIO: Thank you.

17 (SIDEBAR CONFERENCE WAS CONCLUDED)

18 MS. SCAPICCHIO: I have no further questions, your  
19 Honor.

20 THE COURT: Mr. Curran.

21 REDIRECT EXAMINATION

22 BY MR. CURRAN:

23 Q. How many people have you worked with in the  
24 Suffolk County D.A.'s Office over the course of your 20 plus  
25 years?

1 A. It's got to be more than 1,000. There's an average of  
2 110, 125 assistant D.A.'s, there was a support staff of  
3 about 200 people, there was great turnover within the staff,  
4 and, therefore, it's got to be over 1,000.

5 Q. Do you think you should be excused from being a witness  
6 in a case because you may have worked at some point in time  
7 with someone in the D.A.'s Office that's an attorney  
8 representing someone?

9 MS. SCAPICCHIO: Objection.

10 THE COURT: Sustained.

11 Q. Would you ever lie on behalf of some of the people you  
12 worked with in the D.A.'s Office?

13 A. I don't lie.

14 Q. Okay. Ms. Scapicchio sat down and didn't want to ask  
15 you the next question, do you know Mr. Reilly's partner?

16 A. I do.

17 Q. Bill Walsh?

18 A. Yeah, very well.

19 Q. Do you have a very close relationship with him?

20 A. Yes.

21 Q. And you socialize with him as well?

22 A. Yes.

23 Q. You indicated that the hotel was not a hotel that the  
24 D.A.'s Office normally used when you spoke with  
25 Deputy Dunford, correct?

1 A. That's correct.

2 Q. That creates some concern for you?

3 MS. SCAPICCHIO: Objection.

4 THE COURT: Sustained.

5 Q. Did that puzzle you?

6 A. Yes.

7 MS. SCAPICCHIO: Objection.

8 THE COURT: Sustained.

9 THE WITNESS: Sorry.

10 Q. Okay. Well, when it wasn't a hotel that was used by the  
11 D.A.'s Office, did you take steps to confirm with the trial  
12 assistant because of that?

13 A. Yes.

14 Q. Okay. And you wanted to make sure that the trial  
15 assistant knew about --

16 MS. SCAPICCHIO: Objection.

17 Q. -- Ricky Evans being in the hotel, especially since it  
18 wasn't one that you were used to seeing?

19 THE COURT: Overruled.

20 A. Yes, when Deputy Dunford said it was a Howard Johnson's  
21 off the expressway in Dorchester, we had three or four  
22 places we put witnesses, and that was not one of them, the  
23 reasons we didn't put people there, and that surprised me  
24 that it was there, and that's what caused me to think I've  
25 got to check this out to make sure it's an appropriate

1 expense because if it was one of our own hotels, it would  
2 have gone through our billing process already, this one  
3 didn't go through our billing process, it went directly to  
4 the Boston Police Department, and between going directly to  
5 the Boston Police Department post indictment and at a hotel  
6 that we didn't use, it caused me, I've got to look into this  
7 and make sure that it's appropriate because the first  
8 assistant is going to ask me that, and I've got to have the  
9 information for him when I call him.

10 Q. If it was something that the D.A.'s Office wasn't aware  
11 of, would they have paid the bill?

12 A. No.

13 MS. SCAPICCHIO: Objection.

14 THE COURT: Sustained. The objection is  
15 sustained. That's a speculative question.

16 Q. Do you have any questions in your mind as you sit here  
17 today that because of the nature of the disclosure from  
18 Deputy Dunford that you spoke with Phil Beauchesne?

19 A. I did.

20 Q. Okay. And there was a document that was shown, the  
21 question that was asked previously, and you were asked about  
22 what did you do to confirm, and you -- the question before  
23 that starting on page 217, "And once you got that bill  
24 before you agreed whether or not Suffolk County would pay it  
25 or bring it to your superiors to ask them to pay it, did you

1 do anything with the trial prosecutor to determine or verify  
2 whether or not this witness was put up and what the reason  
3 was that he was put up?" What was your answer?

4 A. "I would have confirmed either with the police, the  
5 homicide police, possibly Lieutenant Callahan and maybe  
6 lieutenant in charge of homicide, possibly the trial  
7 assistant, I would have confirmed that yes, it was a witness  
8 in the case and it was our expense."

9 MR. CURRAN: Judge, I move into evidence that  
10 question and answer.

11 THE COURT: You may have that.

12 ( Page 217, line 23 to page 218, line 11 of The  
13 Motion for New Trial was marked and admitted into evidence  
14 as Exhibit No. 16.)

15 Q. The Tiffany Moore murder case was a pretty high profile  
16 case, correct?

17 A. It was.

18 MS. SCAPICCHIO: Objection.

19 Q. And it was being covered in the media on a daily  
20 basis?

21 A. It was.

22 Q. Okay. Do you have any reason to believe that you didn't  
23 follow your common practice and procedure of confirming with  
24 the trial assistant as you sit here today?

25 MS. SCAPICCHIO: Objection.

1 A. I moved --

2 THE COURT: Overruled.

3 MR. CURRAN: I have no further questions.

4 RECROSS-EXAMINATION

5 BY MS. SCAPICCHIO:

6 Q. Sir, do you remember being deposed back in December of  
7 2006, three years after you testified under oath that you  
8 didn't tell Phil Beauchesne; do you remember that, sir?

9 A. I didn't testify under oath that I didn't tell  
10 Phil Beauchesne in 2003.

11 Q. You didn't?

12 A. I said I spoke to either him or Callahan.

13 Q. When you were asked specifically about Phil Beauchesne,  
14 didn't you say you didn't know?

15 A. I said I had no memory of it. That was the question  
16 that I was asked. That's the answer that I gave at that  
17 time. I now have a memory of it having done something to  
18 confirm it.

19 Q. Having talked to Detective Callahan?

20 A. That's correct.

21 Q. Now, page 35, you were asked specifically whether or not  
22 you had a conversation -- this is under oath, too, at your  
23 deposition, right, in 2006?

24 A. Yes.

25 Q. Where you swore to tell the truth, the whole truth and

1 nothing but the truth?

2 A. Yes, I did.

3 Q. In 2006, on page 35, you were asked whether or not you  
4 had a conversation with Beauchesne about disclosing a  
5 witness at the Howard Johnson's; do you remember that, sir?

6 A. Yes.

7 MS. SCAPICCHIO: May I approach the witness, your  
8 Honor?

9 THE COURT: Yes, you may.

10 Q. Sir, when you were under oath in 2006, three years after  
11 you said you didn't have any memory of telling  
12 Phil Beauchesne in 2003, when you were under oath in 2006  
13 and you were asked the question at line 16, "Do you ever  
14 remember having any conversation with Phil Beauchesne on the  
15 Drumgold case about whether or not there should be  
16 disclosure of a witness being put up at the hotel?" What  
17 was your answer under oath in 2006, sir?

18 A. Same one I gave today, "I have no memory of that."

19 Q. And then were you asked whether or not you talked to  
20 Detective Callahan, Walsh, McDonough or Murphy about  
21 witnesses being put up in connection with the Drumgold case?

22 A. Yes.

23 Q. And do you remember at page 36 saying that you didn't  
24 even remember speaking to Callahan in 2006?

25 A. At that time I did not have a memory whether I spoke to

1 Callahan or Beauchesne.

2 MS. SCAPICCHIO: Judge, I move to introduce  
3 this.

4 THE COURT: Do you want to just put this on the  
5 screen again and make it line by line so that only those  
6 portions that are relevant to the examination come in.

7 MS. SCAPICCHIO: There is a portion that isn't  
8 relevant, your Honor, that's why I took it off the screen.

9 MR. CURRAN: Judge, I'd ask for the prior page go  
10 in, page 34.

11 THE COURT: Can you give me the deposition?

12 MR. CURRAN: Page 34, line 9, I'm sorry, line 12,  
13 9 through 12.

14 THE COURT: What are the lines that you seek to  
15 introduce or do I have your only copy?

16 MS. SCAPICCHIO: You do have my only copy, your  
17 Honor, so I apologize.

18 MR. REILLY: Page 35, line 16 through 20.

19 THE COURT: I'm going to allow in question at line  
20 16 and the answer at line 20, and I do not believe that the  
21 comment on 34 should be admissible. I do not believe that  
22 it in fact contradicts page 35, so those lines will come  
23 in.

24 MR. CURRAN: May I offer it for a prior consistent  
25 statement, Judge? Clearly what it says --

1                   MR. REILLY: Objection, your Honor.

2                   THE COURT: No, no, I'm going to overrule, I'm  
3 going to sustain the objection to yours. I'm sorry, I'm now  
4 thoroughly confused. The objection is overruled, just the  
5 portion that Ms. Scapicchio has offered comes in.

6                   ( Francis O'Meara's 2006 deposition at pages 35,  
7 line 16 through 20 was marked and admitted into evidence as  
8 Exhibit No. 17.)

9                   MS. SCAPICCHIO: Thank you, your Honor.

10                  Q. Now, sir, you told us on redirect examination that you  
11 had no question in your mind that you had this conversation  
12 with Phil Beauchesne; do you remember that testimony?

13                  A. Today, you're talking about today?

14                  Q. Well, the truth doesn't change, sir, so, I guess, yeah,  
15 today.

16                  A. The truth doesn't change, ma'am, that's correct.

17                  MR. ROACHE: Objection, your Honor.

18                  THE COURT: The objection is overruled.

19                  Q. The truth should be the same, right?

20                  THE COURT: The objection is overruled. Go on.

21                  Q. Now, sir, do you remember testifying at a deposition  
22 that you never heard back from Leary or Dunford and you  
23 weren't sure if the bill got paid? Do you remember that,  
24 sir?

25                  A. That's correct, that would be my testimony today.

1 Q. Well, didn't you tell us 10 minutes ago that you know  
2 the bill was paid?

3 A. No, I believe it was paid. I don't know it was paid.

4 Q. When you were asked under oath, sir, at page 37, when  
5 you were asked under oath whether or not the bill was paid,  
6 did you tell everyone under oath that you didn't hear back  
7 from Dunford, you didn't hear back from anyone, you weren't  
8 even sure if the bill got paid; is that what you said in  
9 2006, sir?

10 A. At that time I said I was not sure if the bill was paid,  
11 and I'm still not sure.

12 Q. Oh, I'm sorry, I thought you said you knew the bill was  
13 paid?

14 A. No, I said now I believe the bill was paid.

15 Q. What makes you believe it was paid when in 2006 you  
16 weren't sure if it was paid, sir?

17 A. Because it --

18 Q. Did you have a conversation with Detective Callahan?

19 THE COURT: Give him an opportunity to answer.

20 A. Because it never came back to me. First assistant  
21 never, not that he needed to, contacted me back to get more  
22 information, so the presumption I reach is the bill was  
23 paid.

24 Q. So that's a presumption, you don't even know if it was  
25 paid?

1 A. No, I don't.

2 Q. You have no knowledge it was paid?

3 A. I believe it was paid.

4 Q. Do you have anything that suggests that the  
5 Suffolk County D.A.'s Office paid the bill?

6 A. Yes, they never got back to me and asked me more about  
7 it.

8 Q. So that's why you think it got paid?

9 A. That's right.

10 Q. You don't have any memory in 2006 when you were asked  
11 this exact same question as to whether or not the bill got  
12 paid, your memory then was you didn't know, right, you  
13 didn't say then I believe it did, I think it did, I hope it  
14 did, you just said it didn't get paid, right?

15 A. I said at that time I didn't know.

16 Q. Okay. And your memory got better from 2006 to today in  
17 2009, right?

18 A. No, I wouldn't say that.

19 MS. SCAPICCHIO: I have nothing further.

20 THE COURT: Thank you very much. Any further  
21 witnesses?

22 MR. CURRAN: No, your Honor.

23 THE COURT: Ladies and gentlemen, the witness is  
24 excused. The end is in sight, ladies and gentlemen, I want  
25 to make this clear. The evidence is concluded at this

1 portion of the trial. There will not be another portion of  
2 this case that you will have to address. I'd like to take a  
3 few moments with the lawyers to deal with the instructions,  
4 and we'll find out whether your lunch has come, then the way  
5 this will work is that once we resolve what the instructions  
6 should be and any other legal issues that they'll be closing  
7 arguments on damages and then instructions on damages, and  
8 then you'll have an opportunity to deliberate.

9 So we'll just take a break now and the break may  
10 bleed into your lunch, if your lunch is there. Heaven  
11 forbid that we should not let you eat. All rise for the  
12 jury.

13 (Jurors exited the courtroom.)

14 THE COURT: Okay. You can be seated. I want to  
15 deal with the jury instructions. Both sides have the jury  
16 instructions. Before we get to the superseding intervening  
17 cause issue, Mr. Reilly, do you have a motion with respect  
18 to this?

19 MR. REILLY: Yes, your Honor. Under Rule 58, your  
20 Honor, the evidence is not sufficient as a matter of law.  
21 Your Honor, the first test is that the superseding test be  
22 different in kind and that the damage cause be different in  
23 kind. This is the exact same. This is, if you buy  
24 everything they want to give you by every kind of inference,  
25 the harm here is that an individual is kept in jail because

1 of the withholding of exculpatory evidence. It is exactly  
2 the same kind of harm, it's not different in kind, and,  
3 therefore, as a matter of law, this cannot be a superseding  
4 cause.

5                 Secondly, your Honor, the evidence in this case,  
6 when Mr. O'Meara testified, his testimony was I suggest to  
7 you that he told Beauchesne, crediting his testimony, if you  
8 do that, if he told Beauchesne that there was a witness in  
9 Ho-Jo's, the evidence in this case is that there was a  
10 witness, Eric Johnson, who was put up. There's no evidence  
11 here that he told Beauchesne that it was Ricky Evans or that  
12 he told Beauchesne anything more than that there was a  
13 witness there, and so I'd suggest on that ground --

14                 THE COURT: There is evidence in the record about  
15 this other witness whose name is what?

16                 MR. REILLY: Yes, Eric Johnson, your Honor. If  
17 you remember during the trial, Mr. Beauchesne announced to  
18 the defendants, and they argued this in their case,  
19 announced to the defendants when Eric Johnson was asked  
20 where are you staying, he said, Beauchesne said I will  
21 stipulate that he's being put up at a hotel at the expense  
22 of the Commonwealth.

23                 THE COURT: So you're saying that O'Meara's  
24 testimony doesn't make clear whether the witness he was  
25 talking about was Eric Johnson or Ricky Evans?

1                   MR. REILLY: When he talks to Beauchesne, yes,  
2 your Honor, and that's following your Honor's rulings this  
3 morning. They need to show that Beauchesne was on notice as  
4 to this, and this evidence doesn't do it, so I'd suggest on  
5 that grounds, and I'd suggest, thirdly, your Honor, just as  
6 a matter of foreseeability, this is a case where the jury  
7 has found that this officer withheld exculpatory evidence,  
8 and as a matter of law, it is foreseeable that if he  
9 withholds it, it's not going to get and be disclosed to the  
10 defendants absent him doing something. He can't assume that  
11 the district attorney's office will clean this up for me.

12                  THE COURT: Who can't assume this?

13                  MR. REILLY: Callahan. Callahan can't go on the  
14 assumption I can withhold this exculpatory evidence, but  
15 it's foreseeable to me that the D.A.'s Office will find out  
16 sooner or later and they'll disclose, and, therefore, it's  
17 not fair to hold me responsible. That's not like something  
18 that is totally unexpected, you know, it's not the bolt of  
19 lightning, to use the example the Court gave. This is a  
20 process that Mr. Callahan set in play, and the evidence in  
21 this case is not that this was some different in kind,  
22 unexpected, different in type cause.

23                  This is the exact same cause, your Honor, and as a  
24 matter of law, this cannot be a superseding cause.

25                  MS. HARRIS: Your Honor.

1                   THE COURT: Yes.

2                   MS. HARRIS: I think first to frame this argument,  
3 we have to look about what this evidence is. This is  
4 impeachment evidence, this is not evidence of falsified  
5 statements or any of the other litany of bad acts that the  
6 plaintiffs have tried to prove in this case, and I would  
7 suggest that the Supreme Court jurisprudence is abundantly  
8 clear that the decision-making about what is evidence that  
9 has to be disclosed and under what circumstances is left to  
10 the prosecutor's discretion.

11                  They're the ones that make the fine decisions  
12 about what has to be disclosed and what doesn't. It is  
13 absolutely clear, there is no question that in 1990  
14 Paul Connolly wrote in a memo we put Ricky Evans in a  
15 hotel.

16                  That information is undisputedly in the possession  
17 of the district attorney's office. That can't be subject to  
18 any cavil at this stage of the proceedings, it's simply, you  
19 know, it's part of the record of what the district  
20 attorney's office has in its possession.

21                  The issue about whether or not this is  
22 Eric Johnson or Ricky Evans I submit is a false distinction  
23 because Ricky Evans was in the hotel, and as Mr. O'Meara  
24 testified here, the Howard Johnson's was not a hotel that  
25 was used by the district attorney's office so it would make

1 no sense for him to assume that it was Eric Johnson vs.  
2 Ricky Evans when the district attorney's office, as he just  
3 testified, had a number of places where they located  
4 witnesses. This is not a hotel that was one of them.

5 In any event, it's a cloud on the issue since  
6 Paul Connolly knew in 1990 that this witness who was a  
7 witness in both cases, and he knew that, was being housed  
8 anywhere, was being housed in a hotel.

9 The question of whether or not it's foreseeable  
10 that this would be disclosed or not disclosed I think goes  
11 back to what started with our motion for qualified immunity.  
12 Essentially we're asking Lieutenant Callahan to make fine  
13 distinctions about what should be disclosed or not disclosed  
14 and excusing the district attorney's office, who are the  
15 persons who are supposed to be making those decisions  
16 entirely.

17 I would submit to you that the evidence suggests  
18 very strongly that the district attorney's office didn't  
19 consider housing this witness to be the sort of information  
20 that needed to be disclosed.

21 We learned from the first trial, and I believe it  
22 was reiterated here, that Connolly himself never disclosed  
23 the information about housing Ricky Evans. I think it turns  
24 the requirements of Brady completely backward to say that  
25 the district attorney's office when it has this information

1       in its actual possession has absolutely no responsibility  
2       and can't be expected to fulfill their obligations which  
3       have been their obligations since Giglio was decided in 1962  
4       but somehow the lieutenant should have gone to them and  
5       said, excuse me, this is really you should do something  
6       about, you should disclose this.

7                 It's a factual dispute, I understand, but I think,  
8       your Honor, that it really can't be disputed that this  
9       information was in their possession as of 1990. The cases  
10      that talk about what is foreseeable or not foreseeable, even  
11      those cases such as Burke, even the cases such as Wagenmann  
12      would not have found the Magistrate's decision on setting  
13      bail or on granting the indictment to have been a  
14      foreseeable continuation but for the misleading behavior on  
15      the part of the officers in those cases, so to suggest that  
16      it is foreseeable that officers will not comply with or will  
17      exercise their discretion in a different way than somebody  
18      with the hindsight of 20 years would have them exercise that  
19      discretion I think makes the test simply, you know, it's  
20      like that butterfly flaps their wings in Colorado and  
21      there's a tsunami in Sri Lanka.

22                 There is a break to causation when it is  
23       reasonable that somebody exercising independent judgment  
24       makes independent decisions and here, you know, at the risk  
25       of repeating myself, the D.A.'s Office made independent

1 decisions about whether or not Ricky Evans' housing ought to  
2 have been disclosed, and I will defer to my colleagues if  
3 there are points that they would like to make here, but I  
4 simply think we have to bear in mind that we're talking  
5 about the knowledge and the responsibilities of an officer  
6 in 1989, and I submit there is just no basis to find that  
7 the independent decisions here by the D.A.'s Office --

8 THE COURT: Mr. Curran.

9 MS. HARRIS: -- somewhere fall to the side.

10 THE COURT: Mr. Curran, Mr. Roache, does anyone  
11 have anything to add?

12 MR. ROACHE: Your Honor, I think the evidence was  
13 quite clear from Mr. O'Meara that he inquired of  
14 Mr. Beauchesne as to Ricky Evans and not to Eric Johnson, as  
15 my Brother seems to suggest.

16 The question was put right onto Mr. O'Meara, did  
17 you in fact inquire about the housing of Ricky Evans, and he  
18 said yes, I did, and that was as a result of a phone call  
19 from Superintendent Dunford. It was not about Eric Johnson,  
20 it was about Ricky Evans, and I think to suggest otherwise  
21 is misleading, your Honor, at best.

22 THE COURT: Let me say I think this is a close  
23 case whether or not to direct a verdict in favor of the  
24 plaintiff on this issue. I think it is a close case because  
25 clearly the jury found that as of the time of the Drumgold

1 verdict no constitutionally required information had been  
2 turned over to the prosecutor. That's what the jury's  
3 verdict meant, information about the hotel and meals, et  
4 cetera.

5 So the question is did something happen between  
6 the time of the Drumgold verdict and probably January of  
7 1990 that got this information in the hand of the prosecutor  
8 independent of anything Officer Callahan did or didn't do.

9 He got it in the hand of the prosecutor in a way  
10 that the prosecutor could then have exercised independent  
11 judgment about whether to turn this over. It seems to me  
12 the evidence is clear that Detective Callahan set in motion  
13 a series of events that led to this information reaching the  
14 district attorney's office as an expense after the  
15 Treas Carter plea when there was no reason to evaluate  
16 whether or not it had been turned over, the Treas Carter  
17 case was over, and months after the Drumgold case when it's  
18 coming in as tidying up, cleanup expense and not did it have  
19 significance for the case.

20 So there's an argument that Mr. Reilly's argument  
21 which is that Officer Callahan is putting in motion a series  
22 of events that if this makes it to the district attorney's  
23 office at all, it's going to make it a trivial  
24 administrative detail and not the significance that a Judge  
25 of the Superior Court then found it to have.

1           I am troubled by the -- having said all of that,  
2 having said that there's a series of consequences here that  
3 Sergeant Callahan put in motion that makes this, if it  
4 surfaces at all surfaces as a detail, as an expense,  
5 surfaces as an expense arguably in the Treas Carter case and  
6 not necessarily in the Drumgold case, surfaces as an expense  
7 which it's not clear is an Eric Johnson expense or an Evans  
8 expense and surfaces in a way that it's not likely that a  
9 district attorney, should he see it, would understand its  
10 significance to the original case, to the Drumgold case.

11           But having said all of that, the problem is that  
12 Mr. O'Meara today apparently says that he talked to  
13 Phil Beauchesne about this expense, and I have to check to  
14 see if he says he spoke about it in connection with  
15 Ricky Evans. I'm looking for the transcript to see if  
16 that's so, and today he says for the first time apparently  
17 that he spoke to Phil Beauchesne about it in connection with  
18 the Ricky Evans case, in connection with Ricky Evans, and,  
19 strictly speaking, under Rule 50, I can't say, well, I don't  
20 believe him, that's what I'm not allowed to say.

21           I'm supposed to give this to the jury, I'm not  
22 supposed to make credibility determinations as to the  
23 significance of that, and so under the circumstances I'm  
24 going to let this go to the jury, but I'll re-examine this  
25 depending upon the verdict afterwards.

1           In other words, the general idea here is not  
2 strictly speaking, as Mr. Reilly says, that it has to be  
3 different in kind, it has to be not foreseeable, that it  
4 seems to me that there's a reasonable argument here that it  
5 was not foreseeable, that something that's going to come in  
6 as an expense along with all other expenses of the case that  
7 was going to come in as an expense arguably in the  
8 Treas Carter case that was going to come in as an expense  
9 that was ambiguous as to who the witness was would not have  
10 been the kind of thing that any prosecutor would have said,  
11 oh, this is of significance, I have to turn this over.

12           But the witness having said I talked to  
13 Phil Beauchesne about it, it seems to me I can't second  
14 guess as a matter of his credibility, so the superseding  
15 cause instruction will be in the case. Does anyone have any  
16 comments about the instructions? I'm giving a punitive  
17 damages instruction, as you see. There's an interest  
18 instruction. Anything, Mr. Reilly?

19           MR. REILLY: Yes, your Honor, in terms of the  
20 superseding cause, I'd ask that you instruct the jury on the  
21 factors from the restatement as set out in the Russo case in  
22 the First Circuit, and that is No. 1, that the intervention  
23 would bring about a harm different in kind from that which  
24 otherwise would have resulted from the actor's negligence.  
25 The restatement sets out the five step.

1                   THE COURT: Has that been accepted by  
2 Massachusetts?

3                   MR. REILLY: Yes. It's accepted by the First  
4 Circuit, your Honor, that's the First Circuit rule, I would  
5 suggest.

6                   THE COURT: Is this in your memo?

7                   MR. REILLY: It's in my memo, your Honor.

8                   THE COURT: I'll take a look at that. Okay.

9 Go on.

10                  MR. REILLY: So I'd ask, your Honor, that the  
11 instruction on superseding basically track the restatement  
12 and require them to make the findings of the elements of the  
13 restatement say are an element.

14                  THE COURT: I'll take a look at that. I don't  
15 have it immediately in front of me.

16                  MR. REILLY: Secondly, your Honor, in terms of the  
17 punitive damages at this point, the plaintiffs are not  
18 seeking punitive damages.

19                  THE COURT: You're not seeking punitive damages.

20                  MR. REILLY: That's correct.

21                  THE COURT: We'll take that. Next.

22                  MS. HARRIS: Your Honor, on the superseding cause  
23 issue, I would refer to the First Circuit's decision in  
24 Burke vs. McDonald. It's my understanding that although  
25 they refer to the restatement as guidance, they've not

1 adopted it as a step-by-step rule, and instead they focus  
2 particularly in these kind of cases, which I think is the  
3 appropriate place to look, they look at whether the  
4 independent exercise of judgment breaks the chain of  
5 causation.

6 They don't look at the multi-factor test under the  
7 general tort law for superseding cause, and I would suggest  
8 that the controlling language would track that that I've  
9 submitted to the Court in my request No. 1 in superseding  
10 cause and in request No. 2, which speaks to the  
11 foreseeability issue, and I've cited for you two Second  
12 Circuit cases, I'm not aware of any First Circuit case that  
13 discusses whether or not an actor who is not misled may  
14 otherwise err.

15 THE COURT: In other words, you're saying that in  
16 order for this to be a superseding, for this to be not a  
17 superseding, no, in order for this to be a superseding  
18 cause, there has to be the absence of active misleading?

19 MS. HARRIS: I'm suggesting, your Honor, that the  
20 cases that have found there not to be, that the actions of a  
21 third party do not break the chain of causation on issues  
22 having to do with prosecution or holding of criminal  
23 suspects have focused on those areas where those third  
24 parties, whether they be magistrates or courts or  
25 prosecutors have been actively misled, and, therefore, they

1 cannot have used independent judgment.

2 THE COURT: I know there are cases that say that.

3 I don't believe that those are the only circumstances.

4 MS. SCAPICCHIO: Judge, isn't that exactly what we  
5 have here, a jury verdict that says Beauchesne didn't know?

6 THE COURT: What she's saying is that from the  
7 time of the verdict in the Drumgold case that somehow  
8 Officer Callahan is not responsible what happened because he  
9 didn't actively mislead, and I don't think that that's the  
10 law.

11 MS. HARRIS: I would also submit, your Honor, that  
12 this is contained in instructions, but I'm happy to rework  
13 it, but in my motion in limine to limit the damage period, I  
14 think this jury should be instructed what exactly the  
15 responsibility of the district attorney is, and I think it's  
16 clear that their obligation to assess and disclose continues  
17 post trial, certainly continues during the immediate appeal  
18 period.

19 THE COURT: I think that's a fair comment. I  
20 think that's a fair comment.

21 MS. HARRIS: I would also submit that, as we had  
22 discussed earlier, that the burden or the duty that we've  
23 talked about is the duty of disclosure to the district  
24 attorney's office, and I submit that to change that now to  
25 being that the duty post trial is to put it directly into

1 the hands of the trial prosecutor is unprecedented, and I  
2 again would refer to the cases that are in my brief  
3 including the Porter vs. White case from the  
4 Eleventh Circuit which says basically if the information  
5 comes to the district attorney's office from anywhere, from  
6 any source that there is an independent duty on the part of  
7 the district attorney to assess it.

8 THE COURT: That is a criminal case, isn't it, a  
9 criminal appeal?

10 MS. HARRIS: No, it's a civil rights action, your  
11 Honor.

12 THE COURT: They were dealing with the violation  
13 in the first instance, right, not what we're dealing with?

14 MS. HARRIS: They were dealing with the obligation  
15 of the police investigator to provide information,  
16 exculpatory information to the district attorney's office,  
17 and the question was whether or not the district attorney's  
18 office, having had that information, whether the causal  
19 chain between the police officer and the ultimate 1983  
20 violation was broken, and they found that it did.

21 MR. REILLY: Your Honor, the evidence in this case  
22 from every D.A. witness is that the practice in  
23 Suffolk County was to turn over exculpatory evidence, so Mr.  
24 Connolly and O'Meara learned of this information,  
25 Mr. Callahan reasonably and foreseeably knew they were going

1 to assume it was turned over, and there's no evidence that  
2 either Connolly or O'Meara knew that it hadn't been turned  
3 over, so there's no argument they had some independent duty  
4 at that time. They assumed things went where they should  
5 have, and the reason they didn't the jury found --

6 THE COURT: Which is why I thought this issue  
7 hinged so completely on whether Beauchesne had the  
8 information because only Beauchesne knew what he had turned  
9 over and what he hadn't.

10 MS. HARRIS: And the trial record is clear of 1989  
11 that he didn't think he had to turn information over Eric  
12 Johnson being housed in a hotel and that that understanding,  
13 which he said was standard operating procedure, was then  
14 echoed by the trial court. I think we have to bear in mind  
15 that we're talking about these decisions 20 years ago, your  
16 Honor.

17 THE COURT: No, I understand, but it seems to me  
18 that there's a factual issue, and the factual issue is what  
19 goes to the jury. I will examine it again because I want to  
20 look carefully at Mr. O'Meara's testimony, but for now I'm  
21 going to let the jury have this. I'll look again at an  
22 instruction that would say that there's a continuing duty to  
23 disclose because that is absent from our instructions here.  
24 I'll look again at the restatement and see if I agree that  
25 that has to be in here. Is there anything else on the

1 damages instruction?

2 MS. HARRIS: To the extent that we need to renew  
3 our 50(a) motions, I would ask that you consider it to be  
4 renewed.

5 THE COURT: Thank you. They're denied. Yes.

6 Go on.

7 MS. SCAPICCHIO: Judge, we would just note the  
8 objection to the superseding cause. I know we have to do it  
9 at the end of the jury instructions, but just so the record  
10 is clear.

11 THE COURT: Can we find out if they're eating?

12 They are?

13 THE CLERK: No, I'll find out.

14 THE COURT: We'll take a few minutes.

15 MS. HARRIS: I'm sorry, your Honor, are there any  
16 instructions on damages other than the punitives? I did not  
17 receive instructions other than punitive damages.

18 THE COURT: Yes, there were compensatory damages,  
19 page 2.

20 MS. HARRIS: I'm sorry, I apologize.

21 THE COURT: Do you have that?

22 MS. HARRIS: I'm sorry, yes, I do have it.

23 THE COURT: Do you want to spend a minute?

24 MS. HARRIS: We still would raise our obligation  
25 to 2(c), humiliation, embarrassment, loss of self respect

1       with regard to our argument as to actual guilt or  
2       innocence.

3                   THE COURT: Okay, thank you.

4                   (A recess was taken.)

5                   THE CLERK: All rise. United States District  
6       Court is now session.

7                   (Jurors entered the courtroom.)

8                   ( THE FOLLOWING OCCURRED AT SIDEBAR:) )

9                   THE COURT: I just wanted to sort out who goes  
10      first, you would be able to go last on damages and you last  
11      on cross, so who goes last? I think that it would be better  
12      for you to go first and then for the plaintiff to go last.

13                  MS. SCAPICCHIO: Okay.

14                  MS. HARRIS: Your Honor, we have one other  
15      question, your Honor, for the jury instructions.

16                  THE COURT: Yes.

17                  MR. ROACHE: With respect to compensatory damages,  
18      part C, you've instructed about any humiliation  
19      embarrassment, loss of self-respect, et cetera, up to the  
20      present time. Your Honor, there's been no evidence  
21      introduced at trial as to any humiliation or embarrassment  
22      of Shawn Drumgold up to the present time. Ms. Scapicchio  
23      said she'd limit it only to the time he was incarcerated,  
24      and I think to allow this jury --

25                  THE COURT: Okay, I'll change that. I'll take out

1 present time.

2 MS. SCAPICCHIO: Again you won.

3 (SIDEBAR CONFERENCE WAS CONCLUDED)

4 THE COURT: The way this will work would be first  
5 you'll hear from Mr. Curran and then Ms. Scapicchio. Go on,  
6 Mr. Curran.

7 CLOSING ARGUMENT

8 MR. CURRAN: Thank you, your Honor. Ladies and  
9 gentlemen, during the past month, you've listened carefully  
10 to all the evidence presented by both parties. On behalf of  
11 Tim Callahan and his counsel, we want to thank you for your  
12 diligence and all the patience you've given all of us.

13 As you enter this phase of your obligations as  
14 jurors, I want to remind you what we said from the  
15 beginning, and that is that your life experience and common  
16 sense is extremely important and when you go into the  
17 deliberation room. Bring with you your life experience and  
18 your common sense in evaluating the facts that have been  
19 presented in this courtroom, not anything outside, but  
20 solely the facts that you have heard by the witnesses on the  
21 stand, then apply the facts to the law that Judge Gertner is  
22 going to instruct you on the law.

23 At this time you're going to be asked to evaluate  
24 two issues, the damages for Shawn Drumgold and the issue of,  
25 as the Judge alluded before, any superseding or intervening

1 cause of his damages. In assessing his damages, the Judge  
2 will instruct you on compensatory damages. I would suggest  
3 that in assessing his damages, you are to bring with you  
4 your ability to be objective as jurors and evaluate the  
5 facts in evidence. You are to remove any sympathy or  
6 presumption of innocence that you may have for or against  
7 any of the parties in this case, Mr. Callahan or  
8 Mr. Drumgold.

9                 In assessing damages in this case, you're going to  
10 be limited to Shawn Drumgold's conviction on October 13th,  
11 1989 and his incarceration until 2003 when he was released  
12 from prison and any of the damages that are associated with  
13 that incarceration, not to take into consideration his  
14 family's loss, they're not parties here, the only damages  
15 are damages attributable to Shawn Drumgold in regards to  
16 what he suffered.

17                 You don't know anything after his release from  
18 prison, you don't know much prior to his conviction. He  
19 testified about going off that day in shackles to the state  
20 prison. I just ask that you go back in the trial record and  
21 take into consideration the cross-examination of  
22 Shawn Drumgold where he admitted that he had been convicted  
23 of various offenses for possession with intent to distribute  
24 drugs, possession of a firearm and that he had served  
25 sentences and had been incarcerated in the House of

1 Correction and weigh that.

2 In regards to the issue in assessing the issue of  
3 superseding cause and intervening cause, the Judge is going  
4 to tell you that you have to take the facts on that claim  
5 and apply them to the law as she will give you.

6 Now, I want to start by, and I don't mean to  
7 rehash anything but just highlight a few things, and the  
8 issue is in regards to the obligation of disclosure in  
9 criminal cases. I suggest, and the Judge will instruct you  
10 on the law, and follow the law the way she tells you, not  
11 from what I say, I suggest that the law is very clear, that  
12 the allegation of disclosure of material exculpatory  
13 evidence falls squarely on the shoulders of the prosecutor,  
14 the D.A.'s Office, the Suffolk County D.A.'s Office.

15 The officer's only obligation is to disclose the  
16 information and report to the D.A.'s Office, and the D.A.'s  
17 Office carries with it the responsibility and obligation to  
18 assess the information, and what that information is and  
19 determine if it's materially exculpatory evidence --

20 MS. SCAPICCHIO: Objection, your Honor.

21 THE COURT: Overruled. I'll instruct. Go on.

22 MR. CURRAN: -- and whether or not to turn that  
23 information over. That is solely their obligation.

24 Now, in evaluating that issue, I ask to bring with  
25 you your common sense. What I'm going to highlight for you

1       is this testimony, and I'd like you to give some  
2 consideration to it. Now remember every witness that came  
3 before you on this stand had to try to recount something  
4 that occurred 20 years ago, 15 years ago, 15 years or 14  
5 years at the time of the motion for new trial.

6           When you take that into consideration, take into  
7 consideration the prosecutors who came in here and testified  
8 in regards to the number of cases that they've handled, the  
9 murder cases over the years and many years of their service  
10 in the D.A.'s Office.

11           When you look at that evidence, you don't take one  
12 witness and isolate it and evaluate it and either accept it  
13 or disregard it and then move onto the next witness and the  
14 next one. What you do is you take all the evidence  
15 together. It's like a puzzle, you start putting the puzzle  
16 together, and you don't get the full picture until you get  
17 to the end of the puzzle. So you don't guess the beginning  
18 or halfway through, you wait to the end.

19           I want you to take into consideration five  
20 witnesses that you heard on this stand under oath. The  
21 first you did not hear from, Phil Beauchesne.  
22 Paul Connolly, Laura Scherz, David Meier and Francis  
23 O'Meara. Take their testimony and look at it as a whole and  
24 cumulatively.

25           Now, you know that Mr. Beauchesne, and, again, I'm

1 not going to be long on each witness, I just want to  
2 highlight a few things. You know Mr. Beauchesne was not  
3 available to come to testify before you under oath, so you  
4 can judge his credibility for your own by looking at him as  
5 a witness.

6 You have his motion for new trial testimony. That  
7 was read in by Mr. Drumgold's counsel. I just want to -- I  
8 apologize for the glasses, but when you get this age, your  
9 eyes start to go, but there were questions that were asked  
10 at the motion for new trial of Mr. Beauchesne. Do you have  
11 any recollection of whether or not at the time that he  
12 testified Mr. Evans was staying at the Howard Johnson's in  
13 South Boston? Well, from anything I've heard, I believe he  
14 was.

15 MS. SCAPICCHIO: Objection, your Honor.

16 MR. CURRAN: I don't really have a memory that he  
17 was staying there.

18 THE COURT: Mr. Curran, you're dealing with  
19 damages, not --

20 MR. CURRAN: I understand that. I understand  
21 that.

22 THE COURT: Okay, go on.

23 MR. CURRAN: I'll just say for the record it  
24 appears that that's where he was staying, yes, but I don't  
25 know that I recall it.

1 MS. SCAPICCHIO: Objection, your Honor. It's  
2 damages.

3 MR. CURRAN: Judge, it goes to the superseding  
4 cause issue.

5 THE COURT: I understand, that but those things  
6 that occurred before the conviction do not.

7 MR. CURRAN: But it goes to the issue in regards  
8 to what Beauchesne, it's this jury's determination what the  
9 D.A.'s Office knew when they knew it, and this is part of  
10 the puzzle, Judge.

11 THE COURT: Well, I'll let you go on, but the date  
12 is after the conviction.

13 MR. CURRAN: He's asked another question, "If you  
14 could do your best just for the purposes of this hearing  
15 tell Judge Rouse anything about your knowledge, the effect  
16 that Mr. Evans was staying at a hotel at the time of the  
17 trial."

18 MS. SCAPICCHIO: Objection, your Honor.

19 THE COURT: I'll let him go on. Go on.

20 MR. CURRAN: "I would have to say before I came in  
21 for this hearing, I have absolutely no memory of it, I now  
22 have a little bit of memory, and I tried to compress it.  
23 The reason he was taken there was the safe house, I think  
24 the safe house wasn't available, and that's why they had to  
25 put him up there. Ordinarily he would have been a lot safer

1 at our safe house."

2 "Do you have any recollection of doing anything of  
3 that sort with respect to Mr. Evans in this case?" The  
4 question before was in regards to the expenses and putting  
5 him in the hotel. "I don't have a recollection. I know I  
6 must have done it. I believe I did it, but do I remember on  
7 a particular day I spoke to a particular person? I do not."

8 MS. SCAPICCHIO: Objection, your Honor. This is  
9 damages. I move to strike this argument.

10 THE COURT: No, I will instruct you at the  
11 appropriate time. This is to deal with the defense of  
12 superseding cause, but even so, the only question is what  
13 information, what was done, what acts were taken after the  
14 date of the conviction since this jury has already resolved  
15 issues with respect to before the date, so focus on that, if  
16 you will.

17 MR. CURRAN: I will, your Honor. When you go back  
18 to the jury room, take each of the evidence and evaluate it  
19 and determine what the D.A.'s Office knew after  
20 October 13th, 1989, who knew it and what they did with it.

21 Now, you have the memo that's been a topic of  
22 direct examination and cross-examination of Paul Connolly to  
23 Laura Scherz, who was the victim witness advocate on  
24 January 30th, 1990. Take a look at the memo.

25 I want to highlight a few things in the memo.

1 First, he talks about the plea taking place on  
2 December 20th, 1989 when he's detailing his memory of what  
3 occurred back at the plea and what he knew back at the time  
4 of the plea, and he writes to Laura, "Perhaps you remember  
5 that our witness, Ricky Evans, was in need of housing." Why  
6 is that important? That's important because you know that  
7 Laura Scherz' note, which was July 7th, 1989, she wrote  
8 about Ricky Evans, Willie Roy Evans victim, witness cousin  
9 gave info on Tiffany Moore.

10 MS. SCAPICCHIO: Objection, your Honor, this is  
11 July of 1989 before the conviction.

12 MR. CURRAN: Judge.

13 THE COURT: I'm going to give you just a little  
14 bit more room, Mr. Curran, but then I'm going to stop it.  
15 Go on.

16 MR. CURRAN: Why is that important? Because it  
17 talks about him living with a married brother, violating a  
18 lease and that he's referred to the Roxbury multi-service  
19 for housing advocacy and counseling. Why is that important?  
20 Because it shows that the communication within the D.A.'s  
21 Office was working, was working. You have from  
22 Paul Connolly in his memo that he wrote his own words,  
23 "Since we had in effect relocated him to a hotel, his family  
24 had gotten repeated inquiry from his friends wondering where  
25 he was. I believe some of them reporting Ricky's unknown

1       whereabouts back to Carter, Carter's defense lawyer in  
2       candor wanted assurances from me if this were a trial Ricky  
3       would in fact be available to testify."

4              Why is that important? "Since we relocated him."  
5       It shows that the D.A.'s Office had knowledge of Ricky Evans  
6       being relocated to a hotel at the time of the plea in  
7       December, 1989, at the latest, January 30th of 1990.

8              Now, you have also Laura Scherz. Why is Laura  
9       Scherz important? Because Laura Scherz in that note that I  
10       just referred to indicated that she was going to consult  
11       with Phil Beauchesne in regards to the issues of  
12       Ricky Evans.

13              She testified on the stand --

14       MS. SCAPICCHIO: Objection, your Honor.

15       THE COURT: Overruled.

16       MR. CURRAN: She testified on the stand, she  
17       stated that she did her job and she did consult with  
18       Phil Beauchesne. Now, you have to take into consideration  
19       the fact that Phil Beauchesne and Paul Connolly, seasoned  
20       trial lawyers, seasoned prosecutors, had an office right  
21       next to each other separated by a computer room on the same  
22       floor. They saw themselves on a daily basis. They knew  
23       that they shared a common witness, Ricky Evans.

24              Does it make sense that two seasoned prosecutors  
25       in Suffolk County never spoke to each other about the common

1 witness Ricky Evans, never kept each other up to date  
2 regarding what was going on with Ricky Evans?

3 Now, you have David Meier who years later gets the  
4 task of handling the motion for new trial, and what do we  
5 know from David Meier? David Meier said he investigated the  
6 issue of Ricky Evans being placed in a hotel, and he tried  
7 to get to the bottom of it but he confirmed that the D.A.'s  
8 Office paid for Ricky Evans' hotel bill either in its  
9 entirety or a portion of it, and he confirmed that, and he  
10 told you that the records relative to the expenditures from  
11 the D.A.'s Office were sent to the state archives and they  
12 were destroyed after six years so there's no physical record  
13 of a check being written.

14 Then you have Francis O'Meara who came in and  
15 testified today, 20 years later, high profile case, gets  
16 contacted by the Boston Police Department about a bill for  
17 the hotel, and Francis O'Meara says it's not a hotel that we  
18 would ordinarily place our witnesses in.

19 As a result, he took steps to confirm it. As he  
20 said, his policy and procedure on those cases if he wasn't  
21 aware of the expense, he needed to confirm with the trial  
22 prosecutor, and that's what his memory is today because the  
23 trial prosecutor controls that information.

24 Now, when you go to the jury room, I ask that you  
25 bring your common sense and your life experience and ask

1 yourself the questions, does it make sense that two seasoned  
2 prosecutors in excess of 40 years of experience between them  
3 handling high profile murder cases wouldn't talk about a  
4 common witness, Ricky Evans?

5                  Does it make sense that Paul Connolly would write  
6 a memo to Laura Scherz detailing the fact that since we, the  
7 D.A.'s Office, relocated Ricky Evans to a hotel, but he  
8 wouldn't discuss that with the prosecutor whose office is  
9 next door to him separated by a computer room who he saw  
10 every day?

11                  Does it make sense that the D.A.'s Office would  
12 pay for a hotel stay for a witness when they didn't know  
13 about it and didn't approve it? Put the pieces of the  
14 puzzle together, and you add things up in a cumulative  
15 effect that it has. You have Laura Scherz consulting  
16 Phil Beauchesne and Paul Connolly about a common witness.  
17 You have Paul Connolly who told you he knew, we relocated  
18 him to the hotel. "We." You look at Phil Beauchesne who  
19 testified in 2003, I just read the testimony to you. His  
20 memory was vague, but he knew. He knew.

21                  Then you put the pieces of the puzzle together in  
22 regards to the timing of everything, then you recall the  
23 questions that were asked Phil Beauchesne at the motion for  
24 new trial in regards to promises, rewards and inducements  
25 about being placed in a hotel, and his answer was I did not

1 consider that a promise, reward or inducement as I have been  
2 under guard myself. Then the questions were asked again,  
3 putting aside safety, and he kept on saying there was  
4 safety, then he said it was for the convenience of the  
5 Commonwealth.

6 You put all those pieces of the puzzle together,  
7 the D.A.'s Office had the information, they had the  
8 knowledge, it's their obligation to determine and assess its  
9 impact, its exculpatory nature and whether to disclose it.  
10 Their duty is ongoing post conviction, and the Judge will  
11 instruct you.

12 I want to thank you for all your patience. I want  
13 to thank you for all the time but also the consideration  
14 that I know you're going to continue to give all the parties  
15 in this case when you listen to the instructions of the  
16 Judge and you go back and deliberate. Thank you.

17 THE COURT: Mr. Roache, are you addressing the  
18 jury?

19 MR. ROACHE: No, your Honor, thank you.

20 THE COURT: Okay, go on.

21 CLOSING ARGUMENT

22 MS. SCAPICCHIO: Ladies and gentlemen, Mr. Curran  
23 didn't say one word, not one word about the 15 years that  
24 Shawn spent in jail because of Detective Callahan, not one  
25 word, and do you know why? Because he wants you to focus on

1 something else, because he knows the damage award for  
2 15 years of your life, a damage award for 15 years of your  
3 life is so huge that he doesn't want you to focus on it.

4 He wants you to focus over here, look over here,  
5 blame someone else. Now you saw in this courtroom this  
6 morning for the first time in 21 years they put a witness on  
7 the stand who says he told Phil Beauchesne, 21 years he kept  
8 that a secret. Do you believe that? He testified under  
9 oath in 2003 and said he never told Phil Beauchesne, he  
10 testified under oath in 2006 and said he never told  
11 Phil Beauchesne, and the only thing that changed is that you  
12 found Detective Callahan liable and he had a conversation  
13 with Detective Callahan saying it wasn't me?

14 Detective Callahan orchestrated that whole thing.  
15 He's what caused O'Meara to change his mind. O'Meara  
16 doesn't have an independent memory of saying anything. He  
17 sat on that stand and said he didn't have an independent  
18 memory. He's basing his entire testimony on speaking to  
19 Detective Callahan.

20 What do you think Callahan told him, gees, you  
21 know, I tried that whole 2003 thing, it didn't work out  
22 really well for me, they're not going to buy it, better come  
23 up with something else. That's exactly what happened here.  
24 If you think this really happened, this conversation with  
25 Detective Callahan in telling Phil Beauchesne about this

1 whole meet, why on earth wouldn't he have said it in 2003?

2           This was such a high profile case, and he got such  
3 a huge bill, what, he just didn't remember it in 2003? When  
4 Shawn's fighting for his freedom, he can't remember? But  
5 after you found Detective Callahan liable for that 15 years  
6 he spent in jail, now he can? To help out his buddy,  
7 absolutely. They want to distract you with this  
8 information. They want you to say look over here. They  
9 want you to say the D.A.'s Office knew.

10           I want you to focus on what happened to  
11 Shawn Drumgold in those 15 years that he spent in jail,  
12 those 15 years away from his daughter, away from his wife,  
13 away from his family.

14           Mr. Curran said don't focus on his family, you  
15 don't want to focus on his family. He didn't get to see his  
16 family for 15 years. His every movement was controlled by  
17 corrections officers for 15 years, 5,182 days of being told  
18 when to eat, of being told when to sleep, of being told when  
19 you can use the phone, of being told when you can use the  
20 shower, of being told when you can go out and get fresh air,  
21 15 years, and they want you to say don't even think about  
22 it, don't even mention it in passing because how do you  
23 compensate someone for 15 years of their lives?

24           You don't get those birthdays back. You don't get  
25 that first day of school back. You don't get any of those

1 life experiences back, but you can compensate Shawn Drumgold  
2 for them, you can pay him money for those 15 years that he  
3 spent in jail because of Detective Callahan.

4 Now, ladies and gentlemen, they want you to  
5 believe Phil Beauchesne knew. They still want you to  
6 believe Phil Beauchesne knew, and according to O'Meara this  
7 morning he remembers after talking to Detective Callahan  
8 that he actually had a conversation with him some time after  
9 this January memo, that's what he wants you to believe.

10 I'd ask you to look at Phil Beauchesne's testimony  
11 at page 171 when he's asked, "At some point do you ever  
12 remember being present at a conference between the Boston  
13 Police Department and any member of the Suffolk County  
14 D.A.'s Office discussing how the bill for Ricky Evans' stay  
15 at the Howard Johnson's would be split?" His answer, "No."  
16 "Do you know who might have attended the meeting?" "No."  
17 "Do you have any information that the meeting in fact took  
18 place?" "No."

19 It's not what O'Meara told us this morning.  
20 O'Meara told us that he had this conversation and then he  
21 immediately called Phil Beauchesne. Why would Phil testify  
22 in 2003, not only did he have no memory but he never had a  
23 conversation with anyone about it? Phil Beauchesne who was  
24 the trial prosecutor with the open file policy, the guy who  
25 had his whole file copied for defense attorneys, he's the

1 guy who's hiding the evidence now? He's the guy you can't  
2 trust? Are you kidding me? That's what they're selling  
3 today, and it's a story they're selling for the first time  
4 in 21 years. If you really think that story was true,  
5 wouldn't they have told it before now?

6           Wouldn't they have come in when they were trying  
7 to keep Shawn in jail and told it then if it was actually  
8 the truth? We know it's not the truth, ladies and  
9 gentlemen. We know Detective Callahan spoke to O'Meara, and  
10 that's what changed O'Meara's mind, not because he had any  
11 independent memory at all but because Detective Callahan  
12 talked to him.

13           You have a very difficult job of trying to  
14 compensate Shawn Drumgold for those 15 years, and I'd ask  
15 you to look at those photographs that are quite stunning of  
16 his relationship that he had with his family in that 15  
17 years. He had six or seven pictures of his daughter growing  
18 up, and you can see her growing up in the prison, six or  
19 seven pictures. He never got to tuck his daughter in. He  
20 never got to kiss her goodnight in 15 years. He didn't get  
21 to walk her to school, he wasn't there on her first date, he  
22 didn't get to participate in any aspect of her life.

23           The only way, the only way that he got to spend  
24 time with his daughter is when she went through that  
25 visiting room trap up to the various jails to see him. The

1 only way that he got to have any influence on his daughter's  
2 life is through those phone calls and those visits.

3 Detective Callahan took him away from his daughter  
4 and his wife for 15 years. I'm asking you to compensate  
5 Shawn Drumgold for those 15 years. Don't buy what O'Meara  
6 was selling this morning. Don't buy the superseding cause.  
7 Don't buy this whole idea that Beauchesne knew because then  
8 in order to buy that, you have to believe Beauchesne lied,  
9 Beauchesne, the guy who had all the integrity in the world,  
10 according to them, he lied when he testified in 2003.

11 Mr. Curran stands up and wants you to still  
12 believe that Ricky Evans was in the hotel for security  
13 reasons, and you've already decided that's not true and he's  
14 still trying to sell that to you. Fifteen years and never  
15 once getting to take your wife out to dinner, fifteen years  
16 of never once getting to send flowers to your wife on her  
17 anniversary, fifteen years of not ever being able to spend a  
18 birthday or a Christmas or an Easter or a Thanksgiving with  
19 your family.

20 He told you how he spent those holidays. It was a  
21 skeleton crew, if he didn't have a visit, he was locked in  
22 his cell all day. That's how he spent those 15 years, every  
23 holiday, every birthday, every Christmas alone locked in a 6  
24 by 3 cell, three steps one way, 6 steps the other for 16  
25 hours a day for 5,182 days.

1           I'm asking you to hold Detective Callahan  
2 responsible for those 5,182 days, and I'm asking you to  
3 compensate Shawn Drumgold for those 15 years that he spent  
4 away from his family and away from his daughter and away  
5 from his life. Thank you.

6           MR. ROACHE: Your Honor may I be seen at sidebar?

7           THE COURT: Yes.

8           ( THE FOLLOWING OCCURRED AT SIDEBAR: )

9           MR. ROACHE: Your Honor, I object to the closing  
10 argument Ms. Scapicchio where she continually suggested that  
11 Mr. Drumgold spent 15 years in prison. On the facts that  
12 belie that, he spent 14 years in prison. I would ask that  
13 this Judge, that you instruct the jury that it was a 14-year  
14 incarceration and not a 15-year incarceration.

15           MR. REILLY: If you count from the date of his  
16 arrest.

17           MR. ROACHE: Well, you can't count that, your  
18 Honor.

19           MS. SCAPICCHIO: To the date of his arrest was 15  
20 years.

21           MR. ROACHE: It's the date of conviction.

22           MS. SCAPICCHIO: What are you saying, it's  
23 14 years, 9 months?

24           MR. ROACHE: It's 14 years almost to the day.

25           THE COURT: The date of the conviction was what?

1 MS. SCAPICCHIO: October 13th of 1989.

2 THE COURT: Anything else?

3 MR. ROACHE: The date of release was November of  
4 2003.

5 THE COURT: It was November?

6 MR. ROACHE: 2003.

7 THE COURT: Okay. Anything else?

8 MS. SCAPICCHIO: No, your Honor.

9 THE COURT: Thank you.

10 (SIDEBAR CONFERENCE WAS CONCLUDED)

11 JURY CHARGE

12 THE COURT: So this stage of the proceeding  
13 involves determining the damages that flowed from the  
14 finding that you made last week, that is to say, that  
15 Officer Callahan failed to disclose certain exculpatory  
16 evidence, that that evidence was material and that it was  
17 the legal cause of Drumgold's conviction on October 13th,  
18 1989, and I would say to you Mr. Drumgold was released from  
19 jail on November 6th, 2003.

20 But before I turn to the standards for determining  
21 damages, as I said at the beginning of today, I just want to  
22 put this in context. As I said, you've already decided the  
23 question of Officer Callahan's liability. Another jury will  
24 determine whether the other defendants in this case, namely  
25 the City of Boston and Police Commissioner Francis Roache

1 are also liable for any constitutional violation.

2                  You will decide the amount of damages to be aware  
3 to Mr. Drumgold. Bear in mind that there will only be a  
4 single damage award. The remaining defendants may also be  
5 responsible for the damages that you have awarded, if you  
6 do, but only if they are also found liable.

7                  So now let me proceed to the question of damages.  
8 Again, you have already found that Mr. Drumgold's rights  
9 have been violated, that evidence, certain evidence was not  
10 turned over by Officer Callahan at the time of  
11 Mr. Drumgold's conviction. You found that to be material  
12 and you found that the failure to turn it over was a legal  
13 cause of his conviction.

14                  That issue is not to be relitigated at this time.  
15 That finding entitles Mr. Drumgold to compensation for the  
16 actual damages he suffered. You must fix the amount of  
17 money damages which will reasonably and fairly compensate  
18 him for the harm suffered as a result of his conviction.

19                  The elements of injury and harm which you should  
20 consider in calculating these damages which we call  
21 compensatory damages include any fear, anxiety, emotional or  
22 other emotional distress or harm which the defendant  
23 suffered during or after the conviction, any emotional  
24 distress, anxiety or other mental harm which the plaintiff  
25 suffered as a result of his imprisonment, any humiliation,

1       embarrassment, loss of self-respect or esteem or any fear,  
2       anxiety, emotional or other mental distress that the  
3       plaintiff has suffered as a result of the violations of his  
4       civil rights that you have found.

5                 Damages from mental distress should not result in  
6       a windfall to the plaintiff, the plaintiff is only entitled  
7       to the damages that he can prove to you by a fair  
8       preponderance of the evidence.

9                 Now, although this stage is about damages  
10      attributable to the conduct of Officer Callahan that you  
11      have found, an issue has arisen with respect to causation  
12      that also relates to damages. A defendant may be held  
13      liable for the consequences of his actions including actions  
14      attributable to intervening events like the acts or  
15      omissions of third parties when those intervening events are  
16      reasonably foreseeable to him. Sometimes we speak of a  
17      chain of causation. A defendant is responsible for all the  
18      consequences in that chain unless the chain is somehow  
19      broken by a significant intervening event that is  
20      unforeseeable to the defendant.

21                 Bear in mind that on this issue whether there was  
22      a significant intervening cause that broke the chain of  
23      causation, Officer Callahan has the burden of proof by a  
24      preponderance of the evidence. So what is a significant  
25      intervening unforeseeable event in the context of this case?

1 A prosecutor has a continuing duty to disclose exculpatory  
2 evidence that comes to his attention even after a  
3 conviction, and if the prosecutor decided not to turn it  
4 over, that decision may break the chain but only if that  
5 decision is independent of the defendant's original actions  
6 in withholding the information.

7 Specifically you must find, A, that the prosecutor  
8 in the Drumgold case actually received the information which  
9 the officer failed to disclose prior to the conviction. B,  
10 that the prosecutor received it in a fashion that would have  
11 enabled him to exercise an independent decision about  
12 whether it should have been turned over. And, C, that the  
13 prosecutors' failure to turn over that information was not  
14 foreseeable to Officer Callahan.

15 Bear in mind, however, that if you find the  
16 prosecutor did make an unforeseeable decision not to  
17 disclose information at some point after Shawn Drumgold's  
18 trial, Officer Callahan is still liable for any harm  
19 suffered before that decision.

20 Now, Jen, can you put up the verdict slip? So  
21 there are two questions on the verdict slip, and, again, the  
22 answer to question 1, in answering question 1, you do have  
23 to resolve this question of intervening cause that I've  
24 already instructed you on, but you're asked what amount of  
25 compensatory damages do you award to the plaintiff? Then do

1 you award interest on the compensatory damages? We simply  
2 ask you to say yes or no.

3 If you determine that compensatory damages should  
4 be awarded to the plaintiff, you must also decide whether to  
5 award interest. This lawsuit began approximately five years  
6 ago. You may award interest on the sum which you have  
7 decided is an appropriate compensatory award from that time  
8 to the present.

9 Whether you do award interest should depend upon  
10 whether you conclude that interest is necessary to  
11 compensate the plaintiff fully for any injury suffered  
12 bearing in mind that the plaintiff has not had the use of  
13 the damages you award during the time this litigation has  
14 been pending. If you do award interest, the actual sum will  
15 be computed by the clerk at the rate provided by law. So  
16 we're simply asking a yes or no answer to that question.  
17 We'll take a moment again at sidebar to talk to counsel and  
18 then you'll have the case for your decision.

19 (THE FOLLOWING OCCURRED AT SIDEBAR:)

20 MR. REILLY: Your Honor, has the jury been  
21 instructed the superseding cause needs to bring a kind  
22 different in harm?

23 MS. HARRIS: I object to that because the  
24 statement is dealing with negligence, it's not dealing with  
25 a civil rights.

1                   THE COURT: Put your objections on the record.

2                   MR. REILLY: Otherwise they result from acts of  
3 negligence. Secondly, the superseding cause needs to be  
4 extraordinary rather than ordinary in view of the  
5 circumstances at the time of its operations.

6                   THE COURT: Okay.

7                   MS. SCAPICCHIO: Judge we would just object to the  
8 whole instruction on superseding to save that objection.

9                   MS. HARRIS: Your Honor, we would object to your  
10 examples in breaking the chain of causation, your subparts  
11 A, B and C of your instructions to the extent that it  
12 require the jury to find Beauchesne as opposed to anybody  
13 else, as opposed to anybody else in the office actually  
14 received this information.

15                  I raise an objection to as much the interest  
16 instruction that suggests he did not have the use of damages  
17 only for the reason we're not talking about any kind of lost  
18 wage, and I would suggest that any compensatory damage the  
19 jury is awarding is stemming only from emotional distress,  
20 as I understand it, and I would suggest that interest on  
21 that award will be subsumed in the overall award that they  
22 fashion so I would raise a separate objection to the  
23 interest.

24                  THE COURT: We have the opportunity to deal with  
25 that because we've separated out the questions.

1 MS. HARRIS: I would also ask if there's going to  
2 be a question on the jury form for superseding cause.

3 THE COURT: No, I told them to consider it as part  
4 of the damages.

5 MS. HARRIS: I object to it as well. Your Honor,  
6 I did object to the verdict slip, I think interest whether  
7 or not there was a superseding, intervening cause, and if so  
8 what amount of damages do they award against Callahan and  
9 not against anyone else?

10 THE COURT: The verdict slip is identical to the  
11 verdict slip in the first case. It's absolutely identical  
12 in all respects, so you had an opportunity to see it. Just  
13 one second.

14 THE COURT: Have either of you, have the  
15 defendants provided me with verdict slips?

16 MS. HARRIS: We have not, your Honor.

17 THE COURT: Thank you.

18 MR. CURRAN: Judge, one last issue, I don't know  
19 if it was raised if they do find it was a superseding  
20 cause.

21 THE COURT: I did.

22 (SIDEBAR CONFERENCE WAS CONCLUDED)

23 THE COURT: You have the exhibits from Phase I  
24 that are still in the jury room. We don't clean them up.  
25 We'll ask you to go to the jury room again and the rules

1       that I said with respect to deliberations apply again, it's  
2       a group process. We asked all of you to participate. If  
3       you wish to communicate with us, you need to communicate in  
4       writing. You let us know, your verdict has to be unanimous.  
5       You let us know how long you wish to stay, how long you wish  
6       to stay today or whenever and during the course of your  
7       deliberations, you're only to talk to each other and nobody  
8       else and not certainly to read anything else other than the  
9       evidence that has been presented to you at Phase I as well  
10      as Phase II. With that ladies and gentlemen, all rise for  
11      the jury.

12                     (A recess was taken.)

13                     (THE FOLLOWING OCCURRED IN JUDGE'S LOBBY:)

14                     THE COURT: I was just concerned about the  
15       intervening cause issue. Ordinarily one doesn't have to ask  
16       special questions of the jury, but this is a situation where  
17       that could either be -- this is not a yes or no answer. If  
18       they found intervening cause, you could still get a damage  
19       award, it would just be a damage award from October to  
20       January.

21                     So, the issue is if there were post trial motions  
22       whether or not the defendant met his burden of proof, we  
23       would have to guess from the size of the verdict what they  
24       did, and that's a problem, and I didn't realize that was a  
25       problem. Here's the two alternatives, one alternative is

1 that we wait to see what the verdict is and then we ask them  
2 the next question would be did you find superseding cause?  
3 That has the advantage of not messing around with their  
4 deliberations right now. The other would be, and there's no  
5 reason why we can't do that, say did you find superseding  
6 cause, yes or no, or we could amend the verdict slip now, I  
7 have to bring them back into the courtroom.

8 MS. SCAPICCHIO: I prefer to wait.

9 MR. REILLY: I would rather wait.

10 MR. ROACHE: I prefer to amend the verdict slip.

11 MS. SCAPICCHIO: How is that not surprising?

12 THE COURT: Right. Because it really just  
13 occurred to me it's not a situation if they found X, there  
14 would be no damages, it would be different damages, and,  
15 therefore, if I would have to have post trial issues, we'd  
16 have no way of knowing, we'd have to guess.

17 MR. REILLY: I think there would be verdicts they  
18 had or they hadn't at the extremes, and so if they came back  
19 with an extremely high verdict, I think it would be beyond  
20 dispute they hadn't found it.

21 THE COURT: Do you want at this late in the day to  
22 be guessing at anything?

23 MR. REILLY: We could send them back. There's no  
24 reason why we can't send them back.

25 MR. ROACHE: Well, there is, it depends when they

1 do come back and the availability of the Court to address  
2 that issue with them.

3 THE COURT: I will have Judge Woodlock, he loves  
4 baby-sitting for my juries, nobody has to do anything  
5 usually. With all due respect, I think the question needs  
6 to be answered by you or the instructions should be given by  
7 you, and that's why I think.

8 MR. REILLY: That's not a long deliberation.  
9 We've already made a decision, it's a decision they've  
10 already made at that point.

11 MR. ROACHE: That's why, your Honor, I wish we had  
12 seen the verdict slip before.

13 THE COURT: I wish I had gotten one from you.

14 MR. ROACHE: Well --

15 THE COURT: Gee, we're even it seems to me because  
16 we were doing this all on our own.

17 MR. CURRAN: He's not in the case anymore.

18 THE COURT: I wish I had gotten one from the two  
19 of you. If the redacted, if they don't have everything as  
20 yet, perhaps the best thing to do is if we can redo this  
21 verdict slip now and give it to them without explanation,  
22 don't have to pull them in again because the explanation was  
23 already in the instructions that would be the compromise, I  
24 just don't want to bring them down again and bring them up.

25 MS. SCAPICCHIO: I think, Judge, you put the

1 verdict slip up and went over it with them. They're not  
2 dumb, they're going to say it now has three.

3 THE COURT: We'll say amended verdict slip, do you  
4 find intervening cause. We'll put it in terms of the burden  
5 of proof. Do you find that Officer Callahan has met his  
6 burden of proof?

7 MS. SCAPICCHIO: By a preponderance of the  
8 evidence.

9 THE COURT: By a preponderance of the evidence in  
10 the conclusion that there was an intervening cause, period,  
11 and then do you find that the plaintiff has proven damages  
12 by a preponderance of the evidence, we'll make it equal and  
13 then have a number and then have the interest question and  
14 just give it to them with explanation, we can give it to  
15 them and indicate that if they have a question, they can ask  
16 about it.

17 MR. ROACHE: You'll give them a copy of the  
18 written instructions.

19 THE COURT: Yes.

20 MS. SCAPICCHIO: Here's my problem with that,  
21 you've already told them that once they've found that  
22 Detective Callahan withheld exculpatory evidence and not  
23 turned it over to the prosecutor that Drumgold was entitled  
24 to damages, now you're going to tell them that we have to  
25 prove damages by a preponderance of the evidence.

1                   THE COURT: No, I've already said that you have to  
2 prove damages by a preponderance of the evidence.

3                   MS. SCAPICCHIO: Right. But the verdict slip says  
4 what's the compensatory damages.

5                   THE COURT: You're only talking about the order,  
6 then perhaps the question is compensatory damages because  
7 that would be the case with or without intervening cause.

8                   MS. SCAPICCHIO: Right.

9                   THE COURT: Second would be intervening cause.

10                  MS. SCAPICCHIO: If any.

11                  THE COURT: If any. We can try to do this, we'll  
12 wait for now, see what they do. There's really no bar to  
13 asking them the question afterwards.

14                  MS. SCAPICCHIO: I just think it's cleaner to ask  
15 something afterwards.

16                  MR. ROACHE: I think we had that problem in the  
17 first trial, your Honor.

18                  THE COURT: I know.

19                  MS. HARRIS: I was just going to say.

20                  THE COURT: Nobody wanted me to go back where here  
21 it seems to me, well, the difficulty is we won't know is the  
22 problem. There will be a number, and it could be a high  
23 number, even four months, one doesn't know, and the question  
24 is whether we then would speculate, and, gees, at some point  
25 I don't want to speculate about anything, let me draft

1 something, show it to you, if you wait just a second.

2 My preference would be to draft it, to call it an  
3 amended verdict slip and send it up there with a note that  
4 if there are any questions they should let us know. If you  
5 prefer to have everyone come out again we can do that, but  
6 it will delay.

7 MR. ROACHE: I don't think it will be necessary if  
8 they come out, if they have written instructions, just the  
9 amended verdict slip.

10 THE COURT: Do you have to go to Judge O'Toole?  
11 Is that okay?

12 MS. HARRIS: He's winding down and he's been very  
13 accommodating.

14 THE COURT: Stay out there, and we'll get you a  
15 copy. We already have a question?

16 THE CLERK: It's a note.

17 THE COURT: They want to leave at 3:45. "For  
18 Thursday and Friday, the 22d and 23d, we're not available to  
19 deliberate." Because I'm not going to be here tomorrow so I  
20 really want to give them that amended verdict slip.

21 MS. SCAPICCHIO: What does it say?

22 THE COURT: For, Monday, 10-19, "We would like to  
23 leave at 3:45. For Thursday and Friday we're not available  
24 to deliberate."

25 MR. ROACHE: Did you say for Tuesday? For

1 Thursday and Friday. Monday and Tuesday they want to leave  
2 at 3:45?

3 THE COURT: No, just today is 3:45. I'll say  
4 goodbye to them at 3:45. At that point I will give them an  
5 amended verdict slip after I show it to you.

6 MR. CURRAN: Judge, I saw TV reporters.

7 THE COURT: I saw.

8 MR. CURRAN: The other issue which I was going to  
9 bring to the Court's attention, the Internet, it's always  
10 about newspapers, reading The Herald or Globe and the  
11 Internet, even though The Herald paper, the article was  
12 buried, you go on the Internet bang, it's the first thing.  
13 I ask that that instruction be incorporated.

14 THE COURT: Having spoken out loud and figured out  
15 what I'm doing while we're speaking, since I'm going to say  
16 goodbye to them at 3:45, by that point we'll have the  
17 amended verdict slip and then we'll give them a robust don't  
18 turn on anything.

19 MR. CURRAN: Would your Honor entertain a proposed  
20 verdict slip during the interim now at 3:45?

21 THE COURT: You can. You will, too. Thank you.

22 (LOBBY CONFERENCE WAS CONCLUDED.)

23 THE CLERK: Exhibits 1 through 17 are all agreed  
24 upon?

25 MS. SCAPICCHIO: They are from the plaintiffs.

1                   THE CLERK: Defendants?

2                   MR. CURRAN: Yes, satisfied.

3                   (A recess was taken; jury deliberating)

4                   THE CLERK: All rise.

5                   THE COURT: You can be seated. Ladies and  
6 gentlemen, there was a change in the verdict slip which  
7 we'll give you tomorrow morning. There's an amended verdict  
8 slip. There was a question that was left out so I'll give  
9 that to you in the morning. In the morning you'll have the  
10 jury instructions, the written version of what I gave you  
11 orally.

12                  Please don't read about this case. Don't read  
13 about this case. Don't read about any case involving the  
14 Boston Police or constitutional accusations, don't do any  
15 internet research, don't Google anything, don't Twitter  
16 anything, you know, just don't even probe or pry about what  
17 could possibly be going on in the outside world about this  
18 case.

19                  Your focus should be on the information you've  
20 heard in this courtroom and nowhere else. I'll greet you in  
21 the morning when you -- well, you actually can begin  
22 deliberating. I will be around. You can begin deliberating  
23 when all of you are in the jury room. I will be here until  
24 about 10:30 and another Judge will be supervising your  
25 deliberations. I will be in close touch.

1 .

2 THE COURT: Mr. Roache, I had a much simpler  
3 verdict slip. I take it the plaintiffs disagree because the  
4 plaintiffs and defendants disagree about everything?

5 MS. SCAPICCHIO: Absolutely.

6 THE COURT: Right, you disagree?

7 MS. SCAPICCHIO: Yes, I do, especially in the  
8 light of superseding comes even before a determination of  
9 compensatory damages.

10 THE COURT: You like mine better? You don't like  
11 mine either, but you like mine better than his?

12 MS. SCAPICCHIO: I do, I still object to the  
13 superseding issue, question, being included, but I like  
14 yours better than Mr. Roache's, yes.

15 THE COURT: Might as well end this case the way we  
16 began it with no one agreeing to anything.

17 MS. HARRIS: I agree with Mr. Roache's.

18 THE COURT: Mr. Curran, you agree with Mr. Roache.

19 MR. ROACHE: Your Honor, my fear is based on the  
20 admitted verdict slip, it's still rather vague as to what  
21 the jury is actually finding when you ask, you know, did you  
22 find that there was an intervening cause, but there should  
23 be a follow-up to that and to make it more defined as to  
24 what the jury is actually finding as far as damages are  
25 concerned.

1                   THE COURT: I understand that, but they could  
2 find, you know, \$10 million from October, 1989 to January,  
3 1990. In other words, there's an award of damages here  
4 whether there is superseding cause or not.

5                   MR. ROACHE: I agree.

6                   THE COURT: The only question becomes remittitur  
7 which is if they found it in four months, I would have to  
8 make an adjustment or arguably make an adjustment, that's  
9 the only question. That's why I submitted the proposed,  
10 your Honor. The Court put it all into context so it would  
11 give your Honor some idea of what is an appropriate damage  
12 award.

13                  THE COURT: Okay. Let me take a look at it and  
14 I'll see you in the morning. We'll let them begin  
15 deliberating, but I'll come out and talk to you about the  
16 verdict slip, and we'll give it to them at that time.

17                  MR. CURRAN: Judge, in regards to that aspect I  
18 think sooner as opposed to later than in the morning because  
19 I do expect that they'll be some coverage in the papers  
20 before they have a substantive group of discussions that we  
21 go through that colloquy on the Internet and newspaper.

22                  THE COURT: And Twitter.

23                  MR. CURRAN: I still don't know what Twitter is.  
24 I'm still behind.

25                  THE COURT: We'll have a seminar.

1                   THE CLERK: All rise.

2                   (Whereupon, the hearing was suspended at  
3 3:54 p.m.)

4                   C E R T I F I C A T E

5

6                   UNITED STATES DISTRICT COURT )

7                   DISTRICT OF MASSACHUSETTS      )

8                   CITY OF BOSTON                  )

9

10                  I, Valerie A. O'Hara, Registered Professional  
11 Reporter, do hereby certify that the foregoing transcript  
12 was recorded by me stenographically at the time and place  
13 aforesaid in No. 04-11193-NG, in re: Shawn Drumgold vs.  
14 Timothy Callahan and thereafter by me reduced to typewriting  
15 and is a true and accurate record of the proceedings.

16                  /S/ VALERIE A. O'HARA

17

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18                  VALERIE A. O'HARA

19                  REGISTERED PROFESSIONAL REPORTER

20                  DATED OCTOBER 9, 2009

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